

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 705

B. I. SALINGER, JR., PETITIONER,

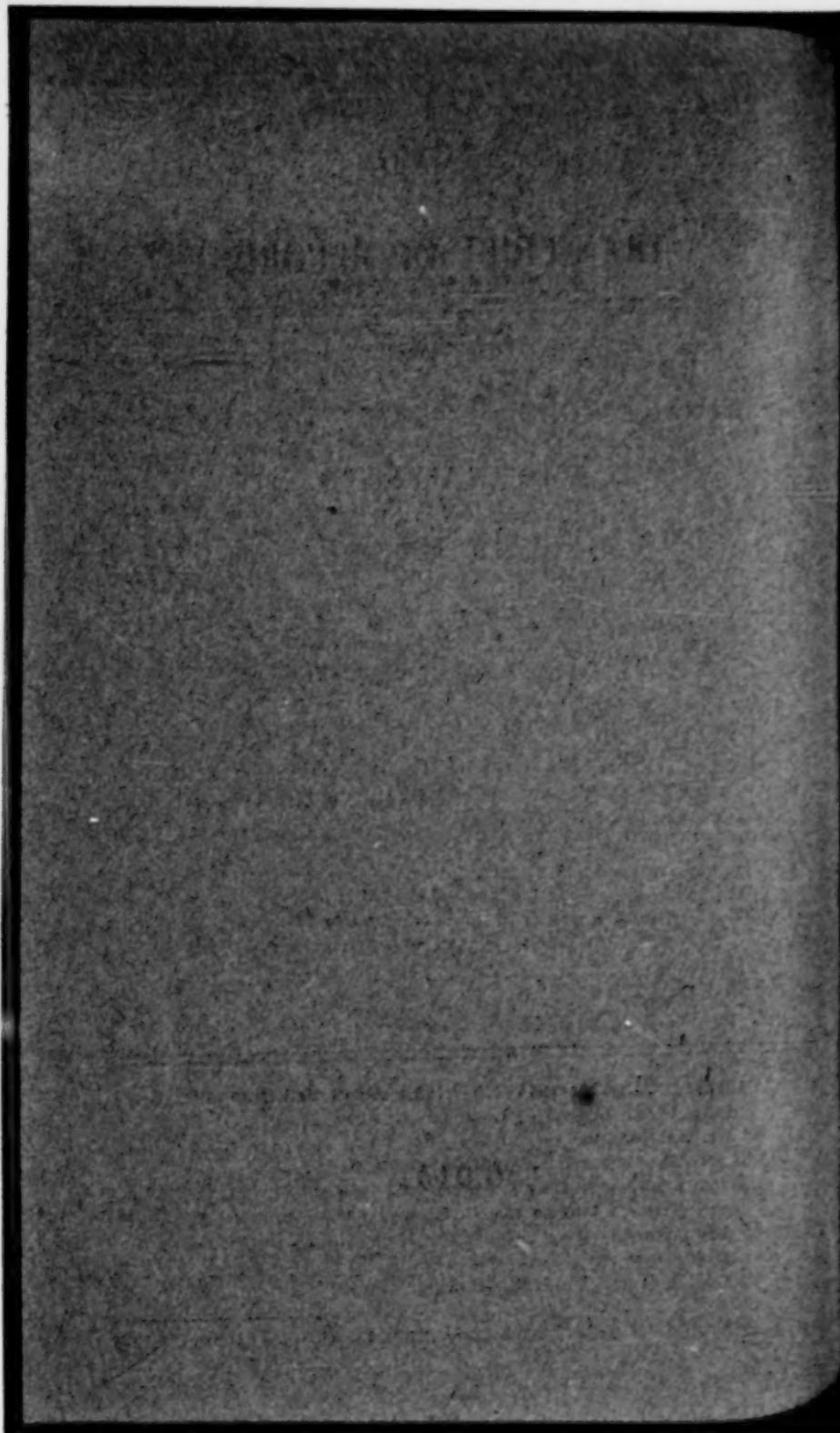
vs.

THE UNITED STATES OF AMERICA AND VICTOR LOISEL,
AS UNITED STATES MARSHAL, EASTERN DISTRICT OF
LOUISIANA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

CERTIORARI AND RETURN FILED DECEMBER 19, 1928

(30,015)



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OF APPEALS FOR THE FIFTH CIRCUIT

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a UNITED STATES OF AMERICA:

**UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH
JUDICIAL CIRCUIT**

[Caption omitted]

[fol. 1] **IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

In the Matter of the Petition of B. I. SALINGER, JR., for Writ of
Habeas Corpus

B. I. SALINGER, JR., Plaintiff,
versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL, as Marshal of
the United States for the Eastern District of Louisiana, Defendants.

PETITION FOR APPEAL—Filed May 1, 1923

To the Honorable the United States Circuit Court of Appeals for the
Fifth Circuit:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself aggrieved by the proceedings, orders and rulings in the United States [fol. 2] District Court for the Eastern District of Louisiana, in a case pending therein entitled "In the Matter of B. I. Salinger, Jr., for Writ of Habeas Corpus," and numbered therein 17243, and particularly by the judgment of said Court discharging petitioner's petition for writ of habeas corpus and remanding petitioner to the custody of the United States Marshal, and by the refusal by said Court to allow petitioner an appeal to the United States Circuit Court of Appeal for the Fifth Circuit, with supersedeas upon a petition therefor duly presented to said Court on the 28th day of April, A. D. 1923.

And your petitioner having been refused an appeal with supersedeas by said Court from its judgment discharging said writ of habeas corpus and remanding your petitioner, hereby prays, under Section 132 of the Judicial Code (Comp. St. sec. 1124) which reads as follows:

"Any judge of a Circuit Court of Appeals, in respect of cases brought or to be brought before that Court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other Courts of the United States, respectively."

that an appeal by writ of error from said judgment discharging said writ of habeas corpus and remanding your petitioner in accordance with law and the rules and practices of said United States Circuit

Court of Appeals and that upon the service of citation the said appeal may operate as a supersedeas until the final disposition of the case by the United States Circuit Court of Appeals.

And in support of this petition your petitioner herewith presents [fol. 3] and files his assignment of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner, By St. Clair Adams, His Attorney.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal to the United States Circuit Court of Appeals for the Fifth Circuit for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith,

[fol. 4] It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the United States Circuit Court of Appeals for the Fifth Circuit, as applied for in said petition, and that said appeal and citation thereof be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the United States Circuit Court of Appeals, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of Five Thousand (\$5,000.00) Dollars, with sureties to be approved by the Clerk of this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of supersedeas bail bond in the penal sum of Five Thousand (\$5,000.00) Dollars, with sureties to be approved by the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., in open Court, before the United States Circuit Court of Appeals for the Fifth Circuit, and that he shall abide the further order of said Court and not depart same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at Huntsville, Alabama, this 30th day of April, A. D. 1923.

R. W. Walker, United States Circuit Judge, Presiding Judge
United States Circuit Court of Appeals.

[fol. 5] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the petitioner above named in connection with his petition for appeal by Writ of Error in the above entitled cause, files herewith his Assignment of Errors which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally *inprisoned*; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

[fol. 6] 2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred especially in ordering the record of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed and to transfer for trial to the Division in which it is charged the offense was committed—wherefore, the Court erred, in any view, in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota, in which it is charged the offense was committed.

5. The Court erred in following Biggerstaff v. U. S. (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said section 53, that "all prosecutions shall be had in the Division in which committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division where it is charged the offense was com-

[fol. 7] mitted; and said decision is in opposition to the decision of the Supreme Court of the United States in Post v. U. S., 161 U. S. 583; 16 Sup. Ct. 611; Paul v. Virginia, 148 U. S. 107; 13 Sup. Ct. 536; and Chennault v. U. S., 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The Biggerstaff case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 245.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in Stever v. U. S. 222 U. S. 167, and in U. S. v. Stewart (C. C. A.) 119 Fed. 89; and U. S. v. Conrad, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and section three of Article three of the Constitution of the United States.

[fol. 8] 9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two co-indictees, and in filing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he, himself, wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the Stever case there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment

be assumed, the only overt acts charged to be in execution of the scheme or conspiracy in mailing, etc., at Sioux City, Iowa.

13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice [fol. 9] described in the indictment; and it erred in failing and refusing to hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme, for in that, the indictment charges said sales to be part of the scheme, and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the Eighth Amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

[fol. 10] 18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegations, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment, whether by means of the said scheme and said letters or otherwise.

19. That the Court erred in ordering the issuance of said warrant or removal, in that said warrant of removal was predicated upon a commitment of Arthur H. Brown, Esquire, United States Commissioner and the legality of which commitment and the indictment upon which it was founded were attacked heretofore in two petitions for writs of habeas corpus; that the petition of petitioner for habeas corpus having been dismissed by the Court, and your petitioner remanded, and the Court hereafter having allowed petitioner appeals from said judgments dismissing his petition for habeas corpus with supersedeas to the Supreme Court of the United States, the Court erred in issuing said warrant of removal of petitioner from the Eastern District of Louisiana to the Southern District of South Dakota, and erred in refusing to hold that said appeals with supersedeas had [fol. 11] the effect of staying said order of removal pending the determination *that said appeals with supersedeas had the effect of stay* States, particularly as said order of removal was bottomed on the same indictment an- the same commitments of the aforesaid United States Commissioner involved in said previous habeas corpus proceedings appealed as alleged aforesaid to the Supreme Court of the United States; that the Court erred in refusing to hold that said appeals, involving as they do the identical questions and issues, jurisdictional and constitutional, they are presented by petitioner here, had the effect of rendering inoperative and nugatory said warrant of removal.

20. That the Court erred in dismissing the petition of petitioner for habeas corpus to inquire into the validity of petitioner's detention and imprisonment under said warrant of removal, because the indictment, commitments and proceedings upon which said warrant of removal was founded were all involved in the said previous habeas corpus proceedings and the effect of the allowance of said appeals and supersedeas to the Supreme Court of the United States from said orders dismissing said petitions was to suspend, stay and render inoperative said order of removal and to prevent the removal of petitioner from the Eastern District of Louisiana to the Southern District of South Dakota pending the determination of said appeals to the Supreme Court of the United States that the Court erred in holding under these circumstances, and it had the power and jurisdiction to issue and make executory said warrant of removal.

21. That the Court erred in issuing said warrant of removal and in giving effect thereto after the aforesaid appeals with supersedeas [fol. 12] were taken to the Supreme Court of the United States, for the reason that the legal effect of said appeals and supersedeas bonds was to supersede the said warrant of removal rendering the same nugatory and putting it beyond the power and jurisdiction of the Court to order its execution, and the restraining and imprisonment of petitioner thereunder. The Court furthermore erred in refusing to hold that the issuance and giving effect to said warrant of removal, under which petitioner is restrained of his liberty, after said appeals and supersedeas to the Supreme Court of the United States were allowed and perfected, was in violation of the constitution of

the United States and in violation of the statutes of the United States and beyond its power and jurisdiction.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

St. Clair Adams, Attorney for Plaintiff and Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT
BOND ON APPEAL

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana in the full and just sum of Five Thousand and no/100 (\$5,000.00) Dollars to be paid to the said United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 1st day of May in the year of our Lord, one thousand nine hundred and twenty-three.

[Vol. 13] Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., Plaintiff, and the United States of America and Victor Loisel as Marshal thereof for the Eastern District of Louisiana, defendants, judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal and had a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America and Victor Loisel as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) B. I. Salinger, Jr. (Seal), By St. Clair Adams, His Attorney (Seal). American Surety Company of New York (Seal), (Signed) By Hilton Sandoz (Seal), Resident Vice-President. Attest: (Signed) E. N. Cowl, Resident Assistant Secretary.

[Vol. 14] Approved by—

(Signed) Frank H. Mortimer, Clerk of the U. S. Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BAIL BOND

Know all men by these presents:

That we, B. I. Salinger, Jr., as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Five Thousand Dollars, to be paid to the United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of May, A. D. 1923.

Whereas, lately, at the February Term, A. D. 1923, of the District Court of the United States for the Eastern District of Louisiana, in a suit pending in said Court between B. I. Salinger, Jr., plaintiff and Victor Loisel, U. S. Marshal for the Eastern District of Louisiana, defendant, a judgment and sentence was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., has obtained an order of appeal from the United States Circuit Court of Appeals, to reverse the judgment and sentence in the aforesaid suit and a citation directed to the said United States of America, citing and admonishing the said Victor Loisel, U. S. Marshal, as aforesaid, to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

[fol. 15] Now the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held in the City of New Orleans, on the third Monday in November, A. D. 1923, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence of the said District Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, His Attorney, American Surety Company of New York.

(Signed) By Hilton Sandoz (seal). Resident Vice-President. Attest: (Signed E. N. Cowl, Resident Assistant Secretary.

Approved:

(Signed) Frank H. Mortimer, Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

[fol. 16] CITATION—Omitted in printing; Filed May 4, 1923

[fol. 17] UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4088

B. I. SALINGER, JR., Appellant,

vs.

THE UNITED STATES OF AMERICA and VICTOR LOISEL, United States Marshal for the Eastern District of Louisiana, Appellees

SERVICE

Received by U. S. Marshal, New Orleans, La., May 4, 1923, and on the same day, month and year I served certified copy hereof on Victor Loisel, U. S. Marshal by handing same to his chief deputy U. S. Marshal, A. A. Schnexnaydre, in person in the office of the U. S. Marshal, in New Orleans, Louisiana.

Victor Loisel, U. S. Marshal, By T. I. Galbreth, Deputy U. S. Marshal.

[File endorsement omitted.]

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

[fol. 18] PETITION FOR WRIT OF HABEAS CORPUS—Filed April 27, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said state and of the United States of America.

2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, towit: at the City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal as aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a warrant of removal, made and dated by the Judge of the United States District Court for the Eastern District of Louisiana of April 26, A. D., 1923, [fol. 19] ordering the removal of your petitioner from said Eastern District of Louisiana to the Southern Division of the District of South Dakota, a copy of which is hereeto annexed and marked for identification herewith Petitioner's Exhibit "A".

4. That, upon information and belief, the said warrant of removal was made by Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, by virtue of a certain commitment that was issued by Arthur H. Brown, Esquire, United States Commissioner, bottomed on a certain indictment found against petitioner in the proceedings entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States for the District of South Dakota, Western Division," charging petitioner with violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked petitioner's Exhibit "B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him, (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa for he was [fol. 20] never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against

United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the [1.21] basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution furtherance of any scheme to defraud, because the indictment and letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of his rights under Section [1.22] of Article three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the [1.23] order, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, [1.22] and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued or order of removal that is based upon said indictment and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention removal or trial under said indictment, or by virtue of any process thereunder would be a violation of the Fifth and Sixth Amendments to and of Section [1.23] of Article Three of the Constitution of the United States,

7. That petitioner shows further that no motion has ever been made by him or for him or with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District, and without his motion or consent, the said indictment and all proceedings thereunder, were, upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's detention for and removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

[fol. 23] 8. Upon information and belief, the said order of removal is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the Statute of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within the said District of South Dakota.

9. That, heretofore your petitioner sued out two writs of habeas corpus in the United States District Court for the Eastern District of Louisiana predicated upon the same grounds as are contained in the foregoing articles of this petition and involving the illegality and nullity of the same indictment; that the writs of habeas corpus issued in said proceedings were made returnable to the United States District Court for the Eastern District of Louisiana on April 20, 1923, and on April 26, 1923, this Honorable Court dismissed said writs and remanded your petitioner; that subsequently petitioner presented petitions for appeal to the Supreme Court of the United States for the decision of this Honorable Court; that said appeals and supersedeas were allowed; that notwithstanding the fact that one of the aforesaid petitions for writ of habeas corpus attacks the commitment of Honorable Arthur H. Brown, United States Commissioner, upon which this Honorable Court predicated its warrant of removal herein yet this Court will not stay the warrant of removal pending the decision of the Supreme Court of the United States on [fol. 24] the aforesaid appeals, and which refusal to stay said order of removal is operating to render nugatory and ineffective said appeals and supersedeas; that the United States District Court for the Eastern District of Louisiana was without power and jurisdiction to make and issue said warrant of removal.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and

em to bring and have your petitioner before this Court at a time
be by this Court determined, together with the true cause of the de-
tention of your petitioner, to the end that due inquiry may be had
on the premises, and that this Court may proceed in the summary
way to determine the facts of this case in that regard, and the le-
gality of your petitioner's imprisonment, restraint and detention,
and thereupon to dispose of your petitioner as law and justice may
require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the 27 day of April, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner.

[p. 25] Jurat showing the foregoing was duly sworn to by St.
air Adams omitted in printing.

UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF
LOUISIANA

ORDER ISSUING WRIT

Now on this 27th day of April, A. D. 1923, the above matter coming upon the petition for the issuance of a writ of habeas corpus, is hereby ordered that said writ issue as in said petition prayed, [Vol. 26] returnable to and before this Court at 11 o'clock A. M. of the 28th day of April, A. D. 1923;

20th day of .
By the Court,

by the Court.
Apr. 27, 1923.

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION

[Title omitted]

ANSWER & RETURN TO PETITION FOR WRIT OF HABEAS CORPUS—
Filed April 28, 1923

to the Honorable the District Court of the United States in and for the Eastern District of Louisiana, New Orleans Division:

Now into Court comes Victor Loisel, United States Marshal for the Eastern District of Louisiana, the defendant herein, through P. Bryant, Jr., Assistant United States Attorney, and for answer Plaintiff's petition, says:

I. For lack of sufficient information to justify a belief, respondent accordingly denies the allegations of fact contained in Article I Plaintiff's petition.

[fol. 27] II. Respondent admits the allegations of fact contained in Article II of Plaintiff's petition.

III. Respondent admits the allegations of fact contained in Article III of Plaintiff's petition.

IV. For answer to Article IV of Plaintiff's petition respondent shows that the warrant of removal referred to in plaintiff's petition was predicated upon a certain commitment theretofore issued by Arthur H. Brown, Esq., United States Commissioner for the Eastern District of Louisiana, on the 18th day of April, 1923; as also upon consideration upon review thereof of the proceedings had before the said United States Commissioner forming the basis of the commitment by the said United States Commissioner, a transcript of which said proceedings were certified to this Honorable Court through a return made by the said United States Commissioner in the proceedings No. 17238, of the docket of this Honorable Court in response to a writ of certiorari issued by this Honorable Court in said proceedings and directed to the said United States Commissioner.

V. Respondent denies the allegations of fact contained in Article V of Plaintiff's petition, and as to the argumentative allegations and conclusions of law in said article, Respondent sayeth not.

[fol. 28] VI. Answering Article VI of Plaintiff's petition and sub-sections a, b, c, d, e, f, and g thereof, Respondent denies all and singular the allegations of fact therein contained, and as to the argumentative allegations and conclusions of law contained in said Article and subdivisions thereof, Respondent sayeth not.

VII. Respondent admits that the indictment was found by a Grand Jury in the Western Division of the District of South Dakota, and thereafter, by order of the Court the place of trial set for the Southern District of said division of South Dakota, but that said order of Court was made in open Court and in the presence of attorneys representing petitioner herein.

Respondent denies all other allegations contained in article VII of Plaintiff's petition.

VIII. Respondent denies all the allegations of fact and conclusions of law contained in Article VIII of Plaintiff's Petition.

IX. Respondent admits the dismissal of the writ of habeas corpus as alleged in Article IX of plaintiff's petition. Respondent denies all other allegations of fact and conclusions of law contained in Article IX of plaintiff's petition.

Further answering, respondent shows that he holds petitioner in prison and restrained of his liberty, and detained under au [fols. 29-82] thority of the commitment and warrant of removal referred to in Article III of plaintiff's petition.

Wherefore, respondent prays that the writ of habeas corpus herein may be dismissed and that petitioner be dealt with as law and justice may require.

(Signed) L. P. Bryant, Jr., Assistant U. S. Attorney.

Jurat showing the foregoing was duly sworn to by A. A. Schexnaydre omitted in printing.

* * * * *

Exhibit Indictment omitted in printing

[fol. 83] EXHIBIT A TO ANSWER AND RETURN

6. Bench Warrant

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D. 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and [fol. 84] seal of said Court, at Sioux Falls, this 18th day of October, A. D. 1922.

Jerry Carleton, Clerk. (Seal of Court.)

DEFENDANT'S EXHIBIT B TO ANSWER AND RETURN

M-356-7

7. Application for Order of Transfer

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF SOUTH
DAKOTA, WESTERN DIVISION

No. 983, W. D.

THE UNITED STATES OF AMERICA, Plaintiff,
againstFRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR.,
Defendants

Motion for Transfer to District of South Dakota—Filed May 2, 1922

Comes now S. W. Clark, the United States Attorney for the District of South Dakota, and respectfully shows unto the Court that the indictment in the above entitled cause was returned by a Grand Jury of the United States drawn from the body of the District at a session of this Court held at the City of Deadwood, Lawrence County, South Dakota, within the Western Division, beginning on the third Tuesday in May, 1922; but that by the recitals in said indictment it appears [fol. 85] that the acts complained of were committed within the Southern Division of the District of South Dakota, and that the trial and all further proceedings herein should be and — within the Southern Division of this District, and by reason thereof application is now made for an order of the Court transferring said cause from the Western Division of the District of South Dakota, to the Southern Division of said District, for all further proceedings herein.

Presented in open Court at Sioux Falls, South Dakota, this 17th day of October, A. D. 1922.

(Signed) S. W. Clark, United States Attorney for the District of South Dakota.

(Indorsed:) No. 983 W. D. In the District Court of the United States, for the District of South Dakota. United States of America, Plaintiff, vs. Fred C. Sawyer, et al., Defendants. Application for Order of Transfer. Filed October 17, 1922. Jerry Carleton, Clerk.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such Clerk, and that such copy is a correct transcript from such original.

[fol. 86] In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of U. S. District Court, Dist. of South Dakota. (Seal.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, James D. Elliott, Judge of the District of the United States, within and for the District aforementioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify, that Jerry Carleton is Clerk of said Court, and was such Clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

(Signed) Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of District Court of the United States for the District of South Dakota.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America, within and for the District aforesaid, do hereby certify, [fol. 87] that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District Court of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

Indorsed: U. S. District Court, S. D. of New York. Filed Dec. 27, 1922.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States, for the Southern District of New York, do hereby certify that the writings annexed to this certificate, namely, Motion for Transfer to District of South Dakota, filed December 27, 1922,

in the case entitled: The United States of America, vs. B. I. Salinger, Jr., et al.; M-7-356, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals. [fol. 88] In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this twenty-eighth day of March, in the year of our Lord One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

Alex. Gilchrist, Jr., Clerk.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 17,233

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 31, 1923

To the Honorable, the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The Petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said State and of the United States of America.
2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United [fol. 89] States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, to-wit: at the City of New Orleans in the said District.
3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a commitment, in *writ*-writing, a copy of which is hereunto annexed and marked for identification herewith "petitioner's Exhibit A."

4. That upon information and belief, the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D., in the District Court of the United States, for the District of South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto

annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted [fol. 90] any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa, for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one nor at the time of nor since the return of said indictment.

6. That said indictment is void, and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

[fol. 91] (d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution or furtherance of any scheme to defraud because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Divi-

sion thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section Two of Article Three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand [fol. 92] Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention removal or trial under said indictment or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments and of Section Two of Article Three of the Constitution of the United States.

7. That petitioner shows further that no motion has ever been made by him or for him or with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District and without his motion or consent, the said indictment and all proceedings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South Dakota, transferred to that last named Division, and that petitioner's detention for and removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

[fol. 93] 8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted,

be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the thirty-first day of March, A. D. 1923.

(Signed) St. Claire Adams, Attorney for Petitioner, 416 Carondelet Bldg.

[fol. 94] Jurat showing the foregoing was duly sworn to by B. I. Salinger omitted in printing.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ORDER ISSUING WRIT OF HABEAS CORPUS

Now on this thirty-first day of March, A. D. 1923, the above matter coming on from the petition for the issuance of a writ of habeas corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock A. M. of the sixth day of April, A. D. 1923; and the petitioner is hereby admitted [fol. 95] to bail pending said hearing in the sum of Five Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct.

By the Court.

(Signed) Rufus E. Foster, Judge.

EXHIBIT A TO PETITION

Order of Commitment

Now on this — day of March, A. D. 1923, the surety named in a certain recognizance, dated the 20th day of February, A. D. 1923, for the appearance of B. I. Salinger at a term of the District Court of the United States of the Southern Division of the District of South Dakota, beginning on the third day of April, 1923, to answer an indictment for violation of Section 215 of the Penal Code of the United States, having in my presence at the City of New Orleans, in the Eastern District of Louisiana, delivered to the United States Marshal of said District, the body of B. I. Salinger, named as principal in said bond, the said B. I. Salinger is hereby committed to the custody of said Marshal, pursuant to and by virtue of said indictment, a certified copy of which is on file in my office, to be by him held until discharged in due course of law.

_____, United States Commissioner for the Eastern District of Louisiana, New Orleans Division.

[fol. 96] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

No. 17238

[Title omitted]

REPORT OF HEARING APRIL 20, 1923—FILED May 2, 1923

Proceedings Had in the Above Entitled and Numbered Matter on Hearing in Open Court Before the Hon. Rufus E. Foster, Judge, on the 20th Day of April, 1923

Appearances: St. Clair Adams, Esq., Attorney for the Petitioner; Louis P. Bryant, Esq., U. S. Asst. District Attorney, and S. W. Clark, Esq., District Attorney for the District of South Dakota, representing the Respondent.

Mr. Bryant: The Government presents a motion praying for order for removal of B. I. Salinger, Jr., and submits herewith motion and order, together with commitment attached.

We file also the return of the Marshal in the proceeding No. 17233, entitled B. I. Salinger vs. Victor Loisel, and also the return of the Marshal in the proceeding No. 17238, entitled B. I. Salinger, Jr., versus Victor Loisel, also in response to writ of Certiorari, directed to United States Commissioner A. H. Browne.

[fol. 97] Offer, Mr. Adams

Counsel for the relator offers in evidence certified copy of the indictment described in the writ, and secondly, certified copy of an

application for order of transfer to the District Court of the United States for the District of South Dakota, Western Division.

FRED C. SAWYER, sworn and examined as a witness on behalf of the Petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. Fred C. Sawyer.

Q. What is your business?

A. Manufacturer's agent.

Q. What is your address?

A. 1814 Mission Street, South Pasadena, California.

Q. Do you know Mr. C. H. Burlingame?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the Mr. Sawyer who is jointly indicted in the District Court of the United States for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1st, 1919, and May 10, 1920?

A. I was not in Dakota during that period.

Q. You were not in South Dakota during that period of time?

A. No, sir.

No cross examination.

[fol. 98] C. H. BURLINGAME, sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. C. H. Burlingame.

Q. What is your business?

A. I am employed by the California Bank, Los Angeles, in the position of manager.

Q. Do you know Mr. Fred C. Sawyer?

A. I do.

Q. Do you know Mr. B. I. Salinger, Jr.?

A. I do.

Q. Are you the C. H. Burlingame who is jointly indicted with these gentlemen in the District of South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the state of South Dakota between June 1st, 1919, and May 10, 1920?

A. Not at all.

No cross-examination.

B. I. SALINGER, JR., sworn and examined as a witness on behalf of the petitioner, testified as follows:

Direct examination.

By Mr. Adams:

Q. What is your name?

A. B. I. Salinger, Jr.

[fol. 99] Q. You are the petitioner in these proceedings for a writ of habeas corpus, are you not?

A. I am.

Q. Where is your home, in what state is it located?

A. My home is in Sioux City, Iowa.

Q. Do you know Mr. C. H. Burlingame and Mr. Fred C. Sawyer who were just on the stand?

A. I do.

Q. Are you the same B. I. Salinger, Jr., who is jointly indicted with those gentlemen in the United States District Court for South Dakota?

A. I am.

Q. At what time or times, if any, were you physically present in the State of South Dakota between June 1, 1919, and May 10, 1920?

A. None at all.

No cross-examination.

Mr. Adams: I suggest that we make the following agreement:

It is agreed that the testimony already taken on the present petition for writ of habeas corpus shall be used in the other case, No. 17,233, just as if the same were actually taken in that case, it being further understood, however, that this agreement shall not be considered to be a consolidation of the two cases. It is furthermore agreed that the testimony referred to above shall be used and deemed to have been taken in the application of the government for warrant of removal.

Mr. Clark: It being understood, however, that the said removal proceedings are separate and distinct from the habeas corpus proceedings.

[fol. 100] Mr. Adams: I can't make that agreement.

TESTIMONY FOR THE GOVERNMENT

T. I. GALBREATH, sworn and examined as a witness on behalf of the respondent, testified as follows:

Direct examination.

By Mr. Bryant:

Q. What is your name?

A. T. I. Galbreath.

Q. You are United States Deputy Marshal here, are you not?

A. Yes, sir.

Q. Did you have occasion to see the plaintiff, Ben I. Salinger, Jr., on the 31st of March, 1923?

A. I don't remember the date, but it was on the date that Mr. Parsons brought him up to the Commissioner's office, whatever date that was.

Q. State the circumstances in detail of this presentation of Salinger?

A. I answered a phone call this morning—

Objection

Mr. Adams: I object to this testimony. I can't see what probative value it can possibly have.

The Court: Whom did you receive the phone call from?

The Witness: The Clerk's office.

[fol. 101] The Court: Well, omit all that. Just tell what took place when Salinger and Parsons came.

Q. Go ahead.

A. Well, Mr. Parsons came into the office with him, and I turned from my desk just as Mr. Parsons had spoken to some deputy in the office—

Objection

Mr. Adams: I object to anything he said to any deputy in the office.

A. —and I walked out and saluted Mr. Parsons as he was leaving the office, Mr. Salinger was left in the office in charge of—well, I really took Mr. Salinger in charge—he stayed in there a little while and brought him into the private office, into the office where I was working, to keep him from being interviewed or addressed by the newspaper people.

Q. Well now, what, if anything, was said to you by Parsons on that occasion?

Objection

Mr. Adams: I object, if Your Honor please. How can we be bound by anything the counsel for the surety company did?

The Court: Anything Mr. Parsons said in the presence of Mr. Salinger is admissible.

Cross-examination.

By Mr. Adams:

Q. As a matter of fact, you did have Mr. Salinger in custody when he was detained in the private office of the Marshal, did you not?

[fol. 102] A. Oh, yes.

Q. Absolutely, no doubt about that, is there?

A. We had him in there all right.

Q. And, further, there is no doubt about the fact you didn't release him until the habeas corpus was served?

A. No, sir, I didn't.

Q. And until you saw a bond that had been approved by the United States District Judge?

A. Yes, sir.

Q. As a matter of fact, you came down to the Clerk's office, and you examined yourself that bond before you permitted Mr. Salinger to leave your custody, did you not?

A. Not only examined the bond but read the order of the Court and then I went to satisfy myself that that order of Court had been strictly complied with before I let Mr. Salinger go.

Q. Prior to your being satisfied with this bond, you detained him under arrest, did you not and in your custody?

A. Well, from the first time we got sight of Mr. Salinger, why, in view of the fact that the office had been in communication with the United States Marshal and the United States District Attorney from Sioux Falls, why we would have kept Mr. Salinger.

Q. Like any other person?

A. We certainly would.

Q. And you did have him under detention until the writ of habeas corpus was allowed by the Court and bond given, didn't you?

A. Yes, sir.

By Mr. Bryant:

Q. When Salinger walked into the office, had you ever seen him before?

[fol. 103] A. How is that?

Q. When Salinger then walked into the Marshal's office on the first occasion, had you ever seen him before?

A. No, sir.

Q. Had you ever heard of Salinger before that first day that he was in your office, surrendered by Parsons?

Objection

Mr. Adams: I object to that "surrendered by Parsons."

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Objection

Mr. Adams: I object to the whole question on the ground that there is nothing in your return or from what this witness has said to indicate that Salinger was surrendered to the Marshal.

Q. Did you ever see him before?

A. No, sir.

Q. Did you ever hear of him before? I am referring to this occasion that Salinger came into the office.

A. I don't think I ever heard of him before.

Q. When was it you heard from the United States Attorney's office in Sioux City?

A. I would have to see that telegram to answer.

The Court: That has nothing to do with the case.

[fol. 104]

Offer

Mr. Clark: We offer in evidence bond, certified copy of bond given by B. I. Salinger, Jr., to the District Court of the United States for the District of South Dakota, at Des Moines, Iowa, on the 13th day of June, 1922, certified to by the Clerk of the District Court for the District of South Dakota.

Objection

Mr. Adams: Objected to on the ground it is foreign to any issue involved in these proceedings, and irrelevant.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of the record before the Circuit Court of Appeals for the Second Judicial Circuit of the United States, certified to by the Clerk of that Court.

Objection

Mr. Adams: Objected to on the ground it is foreign to the issues of this case, and is irrelevant and res inter alios acta and without probative value here, because there can be no res judicata in matters of habeas corpus, the petitioner having the right to apply to any Judge for such writ, whether he has been denied that right on previous occasions by another Judge or not.

The Court: I overrule the objection.

[fol. 105] Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We next offer in evidence certified copy of an order of the District Court of the United States for the Southern District of New York, in the matter of B. I. Salinger, Jr., petitioner for

habeas corpus, showing proceedings had in that regard on the 16th day of March, 1923.

Objection

Mr. Adams: We make the same objection to that offer that we did to the entire record in the New York case, just as if we restated that objection here.

The Court: I overrule the objection.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence a certified copy transcript from the minutes of the District Court of the United States for the Southern District of New York, showing proceedings had in the matter of the removal of B. I. Salinger, Jr., from the Southern District of New York to the District of South Dakota, of date March 20, 1923.

Objection

Mr. Adams: Objected to on the same ground.

The Court: Objection overruled.

[fol. 106] Mr. Adams: I reserve a bill.

Offer

Mr. Clarke: We offer in evidence certified copy of a bond given by B. S. Salinger, Jr., under the order of the District Court of the Southern District of New York, of date March 20, 1923, and conditioned for his appearance before the United States Court for the District of South Dakota for trial at the opening day of April, 1923, term.

Objection

Mr. Adams: Same objection, just as if restated.

The Court: Objection overruled.

Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the record of the District Court of the United States for the District of South Dakota, in the matter of the United States vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., showing proceedings had in that Court in that cause on the 3rd and 4th days of April, 1923, and consisting of motion for forfeiture of the bond and issuance of bench warrants and the allowance thereof by the Court.

Objection

Mr. Adams: We object on the same ground. It is totally irrelevant to any issues here what transpired in the District of South Dakota when we were down here.

[fol. 107] The Court: Objection overruled.
Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the bench warrant referred to in the minutes of the Court for the District of South Dakota last received in evidence and which is attached to the Commissioner's return.

Objection

Mr. Adams: Same objection.
The Court: Objection overruled.
Mr. Adams: I reserve a bill.

Offer

Mr. Clark: We offer in evidence certified copy of the indictment referred to in the Commissioner's return to this Court under the writ of certiorari and annexed thereto.

Mr. Adams: We have no objection to that, inasmuch as we have offered it ourselves.

Mr. Burns: Evidence closed on both sides.

[fol. 108] Exhibit in Evidence: Transcript of Record, United States Circuit Court, Second Circuit—Filed April 20, 1923.

* * * * *

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the order, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between the United States of America, complainant, and B. I. Salinger, Jr., defendant, a manifest error hath happened to the great damage of the said B. I. Salinger, Jr., as is said and appears by his complaint. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New York, together with this writ, so that you have the same at the said place, before the Judges

aforsaid, on the 13th day of December, 1922, with the order and proceedings aforsaid being inspected, the said Judges of the United States Circuit Court of Appeals, for the Second Circuit, may cause further to be done therein to correct that error what of right and ac- [fol. 109] cording to law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 11th day of December, in the year of Our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-seventh.

Alex Gilechrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

J. W. Mack, U. S. District Judge. (Seal.)

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS AND TO FILE PRINTED RECORD

[fol. 110] A motion having been made by the petitioner, B. I. Salinger, Jr., on the 11th day of December, 1922, for an order extending the time of the said petitioner to settle and file a bill of exceptions herein to and including the 13th day of January, 1923, and to extend the time of the said petitioner to file his printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, up to and including the said 13th day of January, 1923, and the said motion having duly come on before me to be heard on the said 11th day of December, 1922.

Now, after hearing William P. McCool, of counsel for the Petitioner, in support of said motion and Maxwell S. Mattuck, Assistant United States Attorney, in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that the time for the petitioner, B. I. Salinger, Jr., to settle and file the bill of exceptions in the appeal herein be and the same hereby is extended ten days from the 12th day of December, 1922, to-wit, up to and including the 22nd day of December, 1922, and it is further

Ordered, that the time of the petitioner, B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeals, for the Second Circuit, be and the same hereby is extended ten days from December 13th, 1922, to-wit, up to and including the 22nd day of December, 1922.

Jno. C. Knox, U. S. D.

[fol. 111] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS AND TO FILE PRINTED RECORD

A motion having been duly made by petitioner, B. I. Salinger, Jr., on the 22nd day of December, 1922, for an order extending the time of the said petitioner to settle and file bill of exceptions herein up to and including the 27th day of December, 1922, and extending the time of said petitioner to file the printed record on appeal with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, up to and including the 27th day of December, 1922, and said motion having duly come on before me to be heard on the said 22nd day of December, 1922,

Now therefore, after hearing William P. McCool, of counsel for petitioner, in support of said motion, and Maxwell S. Mattuck, Assistant United States Attorney in opposition thereto, and due deliberation having been had thereon, it is

Ordered, that the time of petitioner, B. I. Salinger, Jr., to settle [fol. 112] and file the bill of exceptions in the appeal herein be and the same hereby is extended up to and including the 27th day of December, 1922; and it is further

Ordered, that the time of petitioner, B. I. Salinger, Jr., to file the printed record on appeal herein in the Circuit Court of Appeal for the Second Circuit be and the same hereby is extended up to and including the 27th day of December, 1922.

Jno. C. Knox, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL OF EXCEPTIONS

Wrts of Habeas Corpus and Certiorari

Be it remembered, that on the trial of this cause in this Court, at the November, A. D. 1922 term, the Honorable Julian W. Mack, Circuit Judge, presiding, the following proceedings were had and none others, to-wit:

The petitioner, B. I. Salinger, Jr., presented to the Court wrts of habeas corpus and certiorari, granted on the 8th day of November, 1922, together with his petition verified on the 8th day of November, 1922, upon which said wrts were granted.

Return to the wrt of habeas corpus was made by William C. Hecht, United States Marshal.

[fol. 113] Return to the writ of certiorari was made by Hon. Samuel M. Hitchcock, United States Commissioner.

True copies of said writs, petition and returns are annexed hereto and made part of this bill of exceptions.

A hearing was had before the Court thereon, on the 13th day of November, 1922.

No evidence was introduced upon said hearing.

Upon said hearing the Court granted petitioner's motion to amend all papers and proceedings herein so as to correct the spelling of the name of petitioner to "Salinger"; to which the Government took no exception.

The Court also granted petitioner's motion to amend the petition herein so as to allege that the indictment admitted in evidence by the Commissioner was wholly invalid and the Grand Jury had no power to return the same nor the Commissioner power to take any action founded thereon, for the further reason that said indictment was returned by a Grand Jury sitting for the Western Division of the District of South Dakota, whereas certain members of said Grand Jury did not reside within said Western Division but were drawn from other Divisions of said District. The Government thereupon conceded that the said Grand Jury was in fact drawn from the entire District of South Dakota, and not from the Western Division of said District alone, and took no exception to the granting of petitioner's said motion.

At the conclusion of the argument, petitioner requested an opportunity to present a written brief upon the questions raised by him, which application was denied by the Court; to which ruling the petitioner by his counsel, then and there duly excepted.

[fol. 114] At the conclusion of the hearing the Court directed that the said writs of Habeas Corpus and certiorari heretofore granted herein be dismissed and that the petitioner be remanded to the custody of William C. Hecht, United States Marshal for the Southern District of New York, pending his removal to the demanding District; to which ruling of the Court the petitioner by his counsel, then and there duly excepted, and then and there announced in open Court that he would appeal from such ruling and determination to the Circuit Court of Appeals for the Second Circuit, and duly saved his exceptions.

The Court directed that a formal order be prepared and entered upon its decision dismissing said writs over the exception of petitioner, to which ruling, and the entry of which order, the petitioner by his counsel, then and there duly excepted. Pursuant to said direction of the Court said formal order was entered on the 15th day of November, 1922.

After the conclusion of said hearing and on November 14th, 1922, William C. Hecht, United States Marshal, presented to the Court a further return to the writ of habeas corpus, verified November 14th, 1922.

In furtherance of justice and that right may be done, the said B. I. Salinger, Jr., petitioner, tenders and presents the foregoing (together with the documents and exhibits referred to herein and made

part hereof) as his bill of exceptions to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record and the same is accordingly done, this 27th day of December, A. D. 1922.

[fol. 115] By the Court:

(Signed) Julian W. Mack, Judge.

IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS

The President of the United States to Honorable William C. Hecht, United States Marshal, Greeting:

We command you, that you have the body of B. I. Salinger, Jr., by you imprisoned and obtained, as it is said together with the time and cause of such imprisonment and detention by whatsoever name said B. I. Salinger, Jr., shall be called or charged, before me or the Judge presiding at a Criminal Term of this Court to be held in and for the Southern District of New York at the Court House thereof, Old Post Office Building, Borough of Manhattan, New York City, on the 13th day of November, 1922, at ten-thirty o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning him, and have you then there this writ.

Witness, Honorable Learned Hand, a Judge of the District Court of the United States, the 8th day of November, one thousand nine hundred and twenty-two.

Alex Gilchrist, Clerk. Gilbert, Campbell & Barranco, Attorneys.

Writ allowed, bond in the sum of \$10,000.

J. W. M., C. J. (United States Seal of the Court of the Southern District.)

[fol. 116] IN UNITED STATES DISTRICT COURT

WRIT OF CERTIORARI

The President of the United States, to Hon. Samuel M. Hiteheock, a Commissioner of the United States, Greeting:

Commands you, that you certify fully and at large to United States District Court, Southern District of New York, Criminal Division, Criminal Term, at the Court House thereof, Old Post Office Building, Manhattan, New York City, on the 13th day of November, 1922, at 10:30 A. M. the day and cause of the imprisonment of B.

L. Salinger, Jr., by you detained; as is said by whatsoever name the said B. I. Salinger, Jr., shall be called or charged; and have you then this writ.

Witness, Hon. Learned Hand, a Judge of the United States District Court, the 8th day of November, 1922.

Alex Gilchrist, Clerk. Gilbert, Campbell & Barranco, Attorneys.

Writ allowed. J. W. M., C. J. (Seal of the United States for Southern District Court.)

[fol. 117] IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI

The petition of B. I. Salinger, Jr., of Sioux City, State of Iowa, respectfully shows to this Court:

That your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and in the custody of William C. Hecht, the Marshal of the Southern District of New York.

That your petitioner is not detained and restrained by virtue of any final judgment of any Court of competent jurisdiction of any State.

That to the best of the knowledge, information and belief of your petitioner the pretense for his detention is that said Marshal claims the right to hold said petitioner and imprison him by virtue of a certain Warrant of Commitment issued under the circumstances hereinafter related.

That your petitioner is and for many years has been a resident and citizen of the United States and of the State of Iowa.

That on or about May 20, 1922, your petitioner is informed, the Grand Jury of the United States District Court, for the Western Division of the District of South Dakota returned to said Court a certain indictment wherein and whereby, the said Grand Jury charged that your petitioner and certain other parties named in [fol. 118] said indictment were guilty of a violation of Section 215 of the Penal Code of the United States; that as the sole basis for said charge, as your petitioner is informed and believes it was alleged that said defendants had placed in the Post Office of the United States at Sioux City, Iowa, certain letters in consummation of a scheme and artifice to defraud certain persons denominated in said indictment as "the victims."

That on or about the 21st day of October, 1922, your petitioner was arrested by the Marshal of the Southern District of New York. That your deponent is informed and believes that he was arrested

pursuant to a warrant which had theretofore been issued by Hon. Samuel M. Hitchcock, United States Commissioner, upon the affidavit and complaint of Maxwell S. Mattuck, Esq., Assistant United States Attorney for the Southern District of New York, said complaint charging in effect that your petitioner was under the indictment heretofore mentioned and was fugitive from justice.

That thereupon and on the same day, your petitioner was taken before the said United States Commissioner by said Marshal pursuant to said warrant, and then and there was admitted to bail in the sum of One Thousand (\$1,000) Dollars, and the matter set down for a hearing for the 8th day of November, 1922.

That on said 8th day of November, 1922, a hearing was had before the said United States Commissioner, and the said Commissioner thereupon summarily found that there existed probable cause to believe that this petitioner was guilty of the charge against him, and thereupon the said Commissioner cancelled the bail of said [fol. 119] petitioner and committed the said petitioner to the custody of the said Marshal with directions that said petitioner be imprisoned and detained by the said Marshal until a warrant should issue by a Judge of the Southern District of New York, directing the removal of your petitioner from said Southern District of New York to the District of South Dakota, and thereupon a Warrant of Commitment for said custody was issued by said United States Commissioner and placed in the hands of the said Marshal; that thereupon the said Marshal arrested your petitioner and placed him in custody and restrained him of his liberty and detained him, and does still so imprison and detain your petitioner.

That upon the said hearing had before the said Commissioner, the only evidence introduced against the said petitioner was the complaint of said Assistant United States Attorney Mattuck, hereinbefore referred to, together with a certified copy of the indictment returned in the United States District Court for the Western Division of the District of South Dakota. The identity of the person charged in the complaint and indictment with your petitioner was admitted.

That your petitioner duly objected to the admissibility of said complaint and indictment as evidence to show probable cause for believing the defendant guilty of any offense against the United States, and particularly of having committed any offense, and especially the offense charged, within the territorial limits of the Western Division of the District of South Dakota, or within any Division of the District of South Dakota, and your petitioner urged that said indictment and complaint upon its face failed to show or allege that any crime or offense had been committed by your petitioner and especially that any crime or offence had been committed within the [fol. 120] territorial limits and jurisdiction of the District of South Dakota, or in any Division thereof, and particularly in the Western Division thereof, and particularly for the following reasons:

I. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United

States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offence against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefor- said indictment and any proceedings thereunder, and especially any trial, are and would be in violation [fol. 121] of the rights of petitioner under the Fifth and Sixth Amendment of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offense as may be found to be charged in the indictment is charged to have been committed at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now, for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subject to grounds "I, II, III, IV, V and VI" hereof petitioner further states that evidence presented before the said Grand [fol. 122] Jury as to all the counts contained in said indictment except Counts 1, 4 and 6 thereof, was insufficient to sustain the indict-

ment for the reasons among others that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury, there was introduced and used certain books, and the legal custodian of said books although subpenaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII and VIII" hereof presents the affidavits of Charles H. Rathburn and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IX. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, [fol. 123] indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding.

X. Subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together, render it difficult to construe and almost unintelligible; and it so lacks certainty of averment that petitioner ought not to be compelled to respond thereto.

XI. Subject to all of the foregoing grounds, the petitioner says that the indictment attempts to charge a scheme by means of fraudulent pretenses, representations and promises, and with the intent to defraud, to obtain from the persons styled in the indictment as victims certain of their moneys and property by means of inducing them to part with their said property in exchange for shares of stock of the Midland Corporation; said indictment further attempts to charge that the defendants, each and all, including your petitioner, used the Post Office establishment in the United States to transmit to said victims, in alleged execution of said scheme, the letters set out in the indictment and petitioner avers that it appears on the fact of said indictment that none of said letters was in execution of said alleged scheme, but that said letters showed on their face that when they were written they and each of them referred to acts or things then completed and finished and executed, and therefore incapable of being

[fol. 124] further executed; and it appears on the face of the indictment that none of said letters made any effort to obtain anything from any one, nor is it charged that anything was obtained from anyone.

XII. Subject to all of the foregoing grounds, petitioner further says that although the indictment charges nothing but a scheme by such fraudulent means and devices to obtain money and property, and that this was done with intent to defraud, still the indictment nowhere charges that if any thing was obtained from said victims, nor does it contain anything to show that the shares of stock of the said Midland Corporation therein referred to were not of the fair and reasonable value of the consideration paid therefor, and particularly fails to that anyone whosoever was in fact defrauded by your petitioner or by any of the defendants, whether by means of the said letters or otherwise.

Your petitioner further says that the said Commissioner overruled his objections, to which petitioner saved his exceptions, and your petitioner now urges the said objections to this Court in support of this petition for writs of habeas corpus and certiorari with the same force and effect as if hereinagain set forth at length, and urges that the ruling of said Commissioner was erroneous.

Your petitioner further says that he offered evidence before said Commissioner to prove that he was not guilty in fact of the matters and things charged in said complaint and indictment against him, and that there was no probable cause for believing him guilty of the charge, and also offered evidence to prove that the matters and things alleged in said complaint and indictment did not happen or occur [fol. 125] or arise within the District of South Dakota, and particularly within the Western Division thereof, and that the said United States Court within said district had no jurisdiction of the offense; that said Commissioner ruled that he could not receive such evidence and refused to hear or consider the same.

Your petitioner further says that the letters complained of concern the affairs of the Midland Packing Company, a corporation organized under the laws of Iowa, and having its plant, offices and records at Sioux City, Iowa, where the said letters are alleged to have been mailed; that a great majority of the stock was sold in Iowa; it is well known in said State that the money derived from the sale of the stock was honestly administered. That is, your petitioner is informed and believes, prior to the time of the proceedings in South Dakota which culminated in the indictment now under review, the following matters set forth in said indictment were fully investigated first by the Post Office authorities and later by the United States Attorney for the District of Iowa, for the purpose of ascertaining if there existed probable cause to believe that a crime had been committed; that after such investigation had as aforesaid in Iowa the United States Attorney refused to present the matter to the Grand Jury for the District of Iowa. That at the same time that the indictment was found in South Dakota, as your petitioner is informed and believes, the Grand Jury for the District of Iowa was in session

at Sioux City, Iowa, for the hearing of presentment, and no presentment was made to said Grand Jury against your petitioner.

All of the witnesses who appeared before the Grand Jury in South [fol. 126] Dakota, as your petitioner is informed and believes, were brought into the said jurisdiction from Sioux City, Iowa, for the express purpose of testifying. The alleged indictment therefore was found in a wholly foreign jurisdiction far distant from the home city of your petitioner. That your petitioner was never in the State of South Dakota at the time that the acts complained of in the indictment are alleged to have been committed.

By reason of the foregoing your petitioner respectfully urges that he is unlawfully detained and restrained of his liberty, and he prays that writs of habeas corpus and certiorari may issue in his behalf, directed to the Marshal of the Southern District of New York, requiring said Marshal to bring your petitioner before this Court forthwith and to discharge your petitioner from custody.

That no previous application for such writs has been made.

B. I. Salinger, Jr.

Jurat showing the foregoing was duly sworn to by B. I. Salinger, Jr. omitted in printing.

[fol. 127]

EXHIBIT "A" TO PETITION

DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION, DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,

against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR., Defendants

Affidavit of Charles L. Rathbun, Annexed to Petition

DISTRICT OF SOUTH DAKOTA,
County of Brown,
State of South Dakota, ss:

Charles L. Rathbun, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court and appeared and served thereon at said term of Court during which term the above entitled case was presented to said grand jury. That he remembers that three young ladies whose names he does not now recollect, appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out

through the United States mail; that W. J. Shanard of Bridgewater, South Dakota, appeared and testified in regard to a letter that he claimed to have received from defendants through the United States Mail; that Martin Christianson of Viborg, South Dakota, appeared [fol. 128] and testified that he had received certain letters from the defendants through the United States mail at Viborg, South Dakota; that a post office inspector, I think by the name of Hughes, appeared and testified in regard to the letters which he produced and as I believe described in the indictment, that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and as I believe documents from South Dakota, State Securities Commission, that said papers were not identified by any witness except said Hughes; that no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of my recollection now, no other recipients of letters described in the indictment testified before the grand jury except the two persons that I have mentioned, Mr. Christianson and Mr. Shanard; the post office inspector might have testified about the other letters described in the indictment but I am not positive as to each letter.

C. L. Rathbun.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public. (Notarial Seal.)

[fol. 129]

EXHIBIT "B" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DIVISION,
DISTRICT OF SOUTH DAKOTA

M. 7—356

UNITED STATES OF AMERICA, Plaintiff,
against

FRED C. SAWYER, C. H. BURLINGAME, and B. I. SALINGER, JR., Defendants

Affidavit of Samuel W. Huntington, Annexed to Petition—Filed
Nov. 8, 1922

DISTRICT OF SOUTH DAKOTA,
State of South Dakota,
County of Brown, ss:

Samuel W. Huntington, being first duly sworn according to law, deposes and says, that he was summoned to serve as a grand juror at Deadwood in the May, 1922, term of Court, and appeared and served

hereon at said term of Court, during which term the above entitled case was presented to the grand jury. That he remembers that three young ladies whose names he does not now recollect appeared and testified before said grand jury, stating that they were stenographers of said defendants when certain letters were written by defendants and mailed or placed in the mail chute to be sent out through the United States mail; that a party whose name is W. J. Shanard of Bridgewater, South Dakota, to the best recollection of affiant, appeared and testified in regard to a letter which he claimed to have received from defendants through United States mail, that a party whose name is Martin Christianson of Viborg, South Dakota, appeared and testified that he had received certain letters from defendants through United States mail at Viborg, South Dakota; that a post office inspector, affiant thinks by the name of Hughes, appeared and testified in regard to letters which he produced and as affiant believes were described in the indictment that there were certain documents and papers produced by the United States Attorney and offered to the inspector besides said letters and affiant believes that documents from the South Dakota State Securities Commission; that said papers were not identified by any witness except the aforesaid inspector whose name affiant recalls as Hughes; that to the best of affiant's knowledge and belief, no officer of the State Securities Commission appeared to testify to the genuineness and identity of those papers from the State Securities Commission; that to the best of affiant's recollection now no other recipients of letters described in the indictment testified before the grand jury save the two persons mentioned Christianson and Shanard; that the post office inspector may have testified about the letters other than the two Christianson and Shanard described in the indictment, but as to that affiant is unable to state positively.

S. W. Huntington.

Subscribed and sworn to before me this 28th day of September, 1922. F. G. Huntington, Notary Public, State of South Dakota. (Notarial Seal.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America in and for the District of South Dakota, do hereby certify that on the 17th day of October, A. D. 1922, there was filed in the [fol. 131] above entitled Court, on behalf of the defendant, Fred C. Sawyer, in the case of the United States, Plaintiff, vs. Fred C. Sawyer, C. H. Burlingame and B. I. Salinger, Jr., Defendants, Motion to Quash Indictment, that attached to and made a part of said Motion to Quash Indictment is the affidavit of Charles L. Rathbun, marked Exhibit "A," and also the affidavit of S. W. Huntington, marked Exhibit "B"; that I have compared the foregoing copy of said affidavits with the originals thereof, which are in my custody as such Clerk, and that such copy is a correct transcript from such originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District, this 4th day of November, A. D. 1922.

Jerry Carleton, Clerk. By C. C. Schwarz, Deputy. (Seal.)

[File endorsement omitted.]

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New [fol. 132] York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to said writ alleges as follows:

1. Upon information and belief that May 20, 1922, the grand jurors of the United States of America for the District of South Dakota, did present to the United States District Court for the said district an indictment against the said B. I. Salinger, a copy whereof is hereto annexed marked "Exhibit A," and which said indictment is hereby made part hereof with the same force and effect as if the said indictment were here set forth in full.
2. That thereafter, upon information and belief, on October 21, 1922, the United States Commissioner sitting in and for the Southern District of New York, did issue his warrant directed to your respondent, commanding him in the name of the President of the United States of America to apprehend the said B. I. Salinger, who was then and there in the Southern District of New York, and to bring the said Salinger before him, the said Commissioner, at the Post Office Building in the City of New York, to answer to a complaint praying for the removal of the said Salinger to the said District of South Dakota to answer to the indictment aforesaid.
3. That thereafter the respondent duly apprehended the said Salinger within the Southern District of New York.
4. That thereafter, on the 15th day of November, 1922, the relator having been arraigned before the said United States Commissioner. [fol. 133] was heard in opposition to the said prayer for removal, and at the conclusion of the said hearing the said Commissioner committed the said relator to the custody of your respondent to await an order for the removal of the said Salinger to the said District of South

Dakota, there to await trial, and the relator was taken into custody by your respondent.

The sources of your deponent's information and the grounds of his belief as to the facts hereinbefore alleged are the records of the United States Commissioner for the Southern District of New York.

Wherefore, deponent prays that the writ of habeas corpus herein may be dismissed and that the said B. I. Salinger be remanded to the custody of the respondent to be dealt with according to law.

William C. Hecht.

Sworn to before me this 11th day of November, 1922. Henry Straus, Notary Public, N. Y. County Clerk's No. 854. (Seal.)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FURTHER RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

William C. Hecht, being duly sworn, deposes and says that he is the Marshal of the United States for the Southern District of New [fol. 134] York and on his oath makes this return to the writ of habeas corpus allowed herein on November 8, 1922, producing in Court the body of B. I. Salinger mentioned in the said writ, and for a further return to the said writ

1. Denies on information and belief the allegations contained in folio 23 of Paragraph XII of the petition herein and more particularly that allegation in the said petition, that the said Commissioner ruled that he could not receive the evidence offered by the said relator and that the Commissioner refused to hear and consider the same.

William C. Hecht.

Sworn to before me this 14th day of November, 1922. Henry Straus, Notary Public, N. Y. Co. Clerk's No. 854. (Seal.)

IN UNITED STATES DISTRICT COURT

Before Hon. Samuel M. Hitchcock, United States Commissioner for
the Southern District of New York

UNITED STATES

against

B. I. SALINGER, JR.

RETURN TO WRIT OF CERTIORARI

1. Complaint

SOUTHERN DISTRICT OF NEW YORK, ss:

Maxwell S. Mattuck, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York and on information and belief alleges and charges:

[fol. 135] That within the period of three years last past, B. I. Salinger, the defendant above named, was indicted at Sioux Falls, South Dakota, for violating certain statutes of the United States to-wit 215 U. S. C. C. using U. S. mails to defraud.

That an indictment was filed against the said B. I. Salinger in the aforesaid District of South Dakota.

That since the date of the said indictment the said defendant Salinger has been a fugitive from the said District of South Dakota.

That the said defendant Salinger is now within the Southern District of New York, a fugitive from justice as aforesaid; against the peace of the United States and their dignity and contrary to the form of the statutes of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are a telegram to the United States Marshal for the Southern District of New York from the United States Marshal for the District of South Dakota.

Wherefore, deponent prays that a warrant may issue for the above named defendant and that he may be apprehended, bailed or removed to the said District of South Dakota as the case may be.

Maxwell S. Mattuck.

Sworn to before me this 21st day of October, 1922. Samuel M. Hitchcock, U. S. Commissioner, Southern District of New York.

Approved: M. S. Mattuck, Assistant United States Attorney.

fol. 136]

IN UNITED STATES DISTRICT COURT

WARRANT

the President of the United States of America to the Marshal of the United States for the Southern District of New York and to their Deputies, or any or either of them:

Whereas, complaint on oath hath been made to me, charging that B. I. Salinger, Jr., did, within the period of three years prior to the 1st day of October, in the year one thousand nine hundred and twenty-two, at the Southern District of South Dakota, use the mails of the United States to defraud; against the peace of the United States and their dignity and against the form of the statute of the United States in such case made and provided.

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said B. I. Salinger, Jr., and bring his body forthwith before me, or some Judge or Justice of the United States, wherever in the Southern District of New York he may be found, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this 21st day of October, in the year of our Lord one thousand nine hundred and twenty-two.

Samuel M. Hiteheock, United States Commissioner for the Southern District of New York. William Hayward, United States Attorney.

fol. 137] Indorsed: Warrant to Apprehend. Received this warrant on the 21st day of October, 1922, at New York City, and executed the same by arresting the within named B. I. Salinger, Jr., at New York City, on the 21st day of October, 1922, and have his body now in Court, as within I am commanded.

William C. Hecht, U. S. Marshal, S. D. of N. Y.

Defendant arraigned, bail \$10,000. Hearing adjourned to the 11th day of November, 1922, at ten o'clock, A. M. Paroled for bail.

Dated, New York, October 21, 1922.

Samuel M. Hiteheock, U. S. Commissioner, Southern District of New York.

SUNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Before Samuel M. Hiteheock, United States Commissioner.

[Title omitted]

COMMITMENT

Defendant, 11, 8, 1922, after having been heard upon the charge fol. 138] against him, ordered, that he be held to answer to the

charge and any order of the Court that he be admitted to bail in the sum of \$5,000 and that he be committed to the custody — United States Marshal for the Southern District of New York until such bail is given.

Dated, New York, November 8, 1922.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Defendant having given bail, it is ordered that he be released from custody.

Dated, New York.

Samuel M. Hitchcock, United States Commissioner, Southern District of New York.

Bail fixed in the sum of \$10,000. Defendant paroled in custody of counsel until November 9, 1922, 10:30 A. M.

Bail of Commissioner Hitchcock ordered continued until November 9, 1922.

November 6, 1922.

J. M. M., U. S. C. J.

Final Commitment.

[fol. 139] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MINUTES OF HEARING BEFORE COMMISSIONER

Hearing before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, at New York, at his office, Room No. 314, in the United States Court, Post Office Building, City of New York, on November 8th, 1922, at two-thirty p. m.

Appearances: William Hayward, United States Attorney; by M. S. Mattuck, Assistant United States Attorney, Counsel; Gilbert, Campbell & Barranco, 14 Wall Street, New York City; by Richard Campbell and William McCool, Counsel; Wade H. Ellis, Washington, D. C.

Mr. Mattuck: The Government offers in evidence a certified copy of the indictment found in the Western Division for the District of South Dakota on the 20th day of May, 1922, and bench warrant on that indictment issued in the aforesaid district on the 18th day of October, 1922.

Mr. McCool: The defendant objects to the reception of this indictment in evidence upon the following grounds:

[fol. 140] 1. That said indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or

any of the defendants therein named with any crime or offense against the United States or any law thereof, and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

II. That said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

III. That said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

IV. That if any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, that such facts as are charged show that no offense was committed by your petitioner or any or all of the defendants named in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section Three of Article Three thereof.

[fol. 141] V. That petitioner protested that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, and says that in any event such offence as may be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

VI. Petition further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that this Court is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly, to arrest, or detain or imprison, your petitioner, upon any warrant issued that is founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power to direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner.

VII. Subject to grounds, "I, II, III, IV, V, and VI" hereof, petitioner further states that evidence presented before the Grand Jury as to all the counts contained in said indictment except Counts

1, 4 and 6, thereof, was insufficient to sustain the indictment for the reasons, among others, that no person called as a witness before [fol. 142] said Grand Jury had any personal knowl or whether the letters relied upon in-said counts had ever been mailed by petitioner or any of the defendants named, or whether said letters had ever been carried by mail, or whether they had been delivered to the addresses thereof by mail, and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay testimony of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury.

VIII. That said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony, and particularly because at the hearing before the Grand Jury there was introduced and used certain books, and the legal custodian of said books although subpœnaed to appear before and actually in attendance upon said Grand Jury to testify to the identity and custody of said records, was not called as a witness and did not lay the foundation for the introduction or use thereof, and your petitioner in support of grounds "VII" and "VIII" hereof presents the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment.

IV. That subject to grounds "I, II, III, IV, V, and VI" hereof, petitioner says that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense, and fail to inform petitioner, or the other defendants of the charge against him or them or make the same clear to the common understanding.

[fol. 143] X. Subject to grounds "I, II, III, IV, V and VI" hereof, petitioner says that the indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations, which defects when taken together render it difficult to construe and almost unintelligible.

Furthermore, the indictment charges a scheme by means of fraudulent pretenses with intent to defraud and in connection with said scheme the use of the Post Office establishment. It appears on the face of the indictment that when the letters were written, the acts had then been completed and executed and were incapable of being furthered by the use of the mails.

And finally that the indictment does not charge what, if anything, was obtained from the victims named in the indictment and does not show any fraud exercised. The only fraud alleged, referring to the sale of shares of stock of the Midland Corporation, and nothing in the indictment to show that they were not worth the consideration that was paid therefor.

Upon all these grounds, Mr. Salinger claims that the indictment should not be received in evidence it being wholly void on the face thereof.

The Commissioner: I cannot pass upon any such question as that until the indictment is in evidence.

Mr. McCool: Do you overrule my objection, Mr. Commissioner?

The Commissioner: Yes.

[fol. 144] Mr. McCool: I save my exception to that.

The Commissioner: Have you a similar objection to the warrant that has been issued pursuant to the indictment?

Mr. McCool: Precisely. That has not been offered yet.

The Commissioner: Yes, it has been offered.

Mr. McCool: I make the same exception to the warrant, on the ground that it is wholly immaterial and not founded on a valid indictment.

The Commissioner: Your objections are overruled at the present time.

Mr. McCool: I respectfully except. It is now in evidence, and I move to strike it out on like grounds, both the indictment and the warrant.

The Commissioner: Motion denied.

Mr. McCool: I respectfully except.

Mr. Mattuck: The defendant concedes the identity of the witness.

The Government rests.

[fol. 145] Mr. McCool: I move to dismiss the proceedings upon the same grounds which I stated in my objection to the reception of the indictment: No evidence to show that there is any valid indictment and no evidence to show that there is any reasonable cause to show the man is guilty.

The Commissioner: Unless an indictment is so absolutely bad upon its face that there can be nothing said in its favor, it is held practically in every district, and it has been held in the Supreme Court of the United States, that the proper place to raise *each* objection is in the forum in which the indictment was found.

I have not had an opportunity to examine this indictment at length. It has only been offered to-day and since it has been offered this morning it has been in the custody of counsel for the defendant and the Commissioner has not even read it.

I understand that this matter is one which is to be expedited and that an application is going to be made to the Court in regard to this indictment and that the ends of the defendant will best be satisfied if he rests now on this motion and my ruling; by having me commit the defendant to the custody of the marshal and then you will make such application in the Courts as you may desire.

Mr. McCool: You rule, then, that your Honor will not receive any evidence that this man is not guilty in fact? Does your Honor want to go into that?

Mr. Mattuck: Yes, we will receive any evidence you want to offer.

[fol. 146] Mr. McCool: We cannot offer any to-day. We want reasonable opportunity to present evidence that the man is not guilty in fact.

The Commissioner: One moment. I do not see a great deal that you can do. It is incurring a large expense. If your objections to the indictment are good and valid, they will be up-held by the Court, and if they are not, the Court will send this matter back to me for further hearing upon your suggestion. Your rights may be saved in that way, whatever rights you may have, but for the purpose of expedition, and you, having been informed that the District Attorney for the demanding district would be here at this time, I think it is only proper that this proceeding should take this course.

Mr. McCool: In other words, the evidence will not be received?

Mr. Mattuck: Just one moment. I will ask the Commissioner not to rule until I have made my statement about the reception of evidence at this time. I would like to make a statement on the record.

The Commissioner: Go ahead.

Mr. Mattuck: When was it you were here with me, Mr. McCool?

Mr. McCool: The 21st of October was the first time.

[fol. 147] Mr. Mattuck: No, that you actually came with me to the Commissioner's office?

The Commissioner: That was the 21st of October.

Mr. Mattuck: On the 21st of October, 1922, Mr. McCool came with Government counsel to the office of the United States Commissioner for the purpose of arranging a date mutually convenient to himself and to the Government's counsel for the proceeding with the hearing of this case. At that time and in the presence of the Court, Government's counsel stated to Mr. McCool that the Government would be ready to proceed on Monday, November 6th, with the hearing, at which time the course that the Government would follow would be this: That the indictment would be offered in evidence and that identity of the defendant would be proved, whereupon the Government would rest.

It was also stated at that time by counsel for the Government that Mr. Clark, the District Attorney of the District in which the indictment was found, was coming here and that in order that he may not be put to the inconvenience and expense of remaining in this district over an extended period of time, it was suggested at that time to Mr. McCool that he be prepared on November 6th to go on with the hearing in order that the hearing may be completed within as short a space of time as possible, and that in the event of a commitment by the Commissioner, he would be enabled to procure his writ and have the matter cleaned up within three days.

Mr. McCool at that time stated that November 6th, would be inconvenient for him but that if I would agree to November 8th, the [fol. 148] day following Election Day, it would be absolutely agreeable to him to proceed with the hearing at that time, and in the event of a commitment, to have his papers prepared and to go before the Court on a petition for a writ.

Mr. Mattuck Government's Counsel, at that time stipulated that that was perfectly agreeable; that on November 8th Mr. Clark would be notified to be here, at which time he would be prepared to go on with and complete the hearing, Mr. Clark coming all the way from South Dakota. Mr. McCool agreed.

Government's counsel now objected to any further delay in the going on with this hearing, but does not oppose the admission of any evidence which the defense wished to offer now in rebuttal of the resumption of probable cause created by the indictment. The objection of Government's counsel is entirely to delay, a delay which every effort was made by Government's counsel to forestall ten days ago. Within that period of ten days, it is urged that every effort could have been made by the defense to have procured any witnesses which they desired to rebut probable cause. The objection of Government's counsel, therefore, is not to the admission of evidence, but a delay and a postponement of this hearing on the grounds stated.

Mr. McCool: Before this morning it was impossible for the defendant to know what indictment he was called to answer in this district. The indictment was inspected this morning. It now shows an indictment found in the Western Division of the District of South Dakota. I want an opportunity to meet that particular indictment, as we understand another indictment has been found [Vol. 149] in another Division. There is no desire on the part of the defendant to delay this hearing if the Government is not willing to give us reasonable opportunity to present our witnesses and bring them on and answer this indictment, of course it is impossible to do today.

I understand that the Commissioner has ruled that that evidence will not be received, to which I save my exception.

The Commissioner: I have not ruled any such way at all and the record will not show it. On the other hand I appreciate that this hearing before me is for the purpose of taking testimony.

I am perfectly familiar with the case of the United States vs. Green, where the action was decided by Judge Brown in the first instance twenty-five years ago, and I certainly never said that I would not receive evidence. But it is a question of when that evidence could be presented.

It is perfectly clear to my mind what happened before me on the 1st day of last month. Then the matter was set over until the 4th November for the reasons stated, that the District Attorney for the demanding district would be here at that time, and it was suggested that you be prepared at the time to go on with the hearing. If you are not prepared and the government has made its prima facie case by representing this indictment, I have overruled your objection to its receipt in evidence, then of course, I have nothing else to do. The Government demands it and having in mind what the arrangements were and also having in mind that you might have obtained a copy of the indictment by application to the Court in which it was found.

[Vol. 150] Mr. Mattuek: Not only that. May I state on the record that there was handed to me, Government's Counsel, the date of the original arrest of Mr. Salinger (that was on October 21st or 22nd), a copy of the indictment itself by counsel for the defense. I think it is a clear rebuttal of the argument that they did not know what they were indicted for.

Mr. McCool: We did not know which indictment we were to answer because there was another indictment.

Mr. Mattuck: We are only calling upon counsel to answer the indictment that he would know about.

Mr. McCool: We were told here that another indictment had been found in another division.

Minutes of Hearing Before Commissioner

Mr. Mattuck: If your Honor pleases, the Government's Counsel cannot be responsible for everything the defendants have been told. The defendants are being called upon here to answer an indictment, a copy of which they themselves gave me some fifteen days ago.

Mr. McCool: There is not any use of our going ahead with our proofs or just one section of it. It is not going to do the defendant [fol. 151] any good until he can bring all his witnesses here.

Mr. Mattuck: You are just attacking the matter here and I do not see any useful purpose in it.

Mr. McCool: We make our offer, if reasonable opportunity is given to us, to prove that we are not guilty of fact. I understand that the Government objects to reasonable opportunity being given.

Mr. Mattuck: The Government objects to an adjournment.

Mr. Campbell: Which is the same thing.

The Commissioner: I do not understand that it is the same thing. You had this indictment before you at the time that this defendant was here and then you were given from the 21st of October until the 4th of November to prepare for this hearing.

Mr. Campbell: Up to this morning, we did not know to which of these Indictments we were going to answer. I understand that there is another indictment.

Mr. Mattuck: I do not understand anything about it. We are not responsible for the understanding of counsel.

The Commissioner: I have passed upon this matter. [fol. 152] Mr. Mattuck: The Indictment which you are called upon to answer is the indictment which you have had in your possession for a long time; just how long, I do not know, but certainly from the date of the inception of this hearing.

Mr. McCool: Another thing that I would like to call your Honor's attention to in support of the reasonableness of my request is this: Part of our proof consists of the books of the company. We are enjoined at this time by the order of the Court, as I understand it, from even looking at those books, much less producing them. We would have to leave opportunity to have that order vacated and bring those books on, so that we could prove our case. It would take at least fifteen days to try this case on its merits.

Mr. Mattuck: In answer thereto, Government's counsel will offer a certified copy of the proceedings that have heretofore taken place in the District of South Dakota, wherever it is. I would like to state on the record, if your Honor please, just what has taken place in this case. Then I will offer the paper itself in evidence, if necessary.

The indictment, as already stated, was found on the 20th day of May, 1922. Two of the defendants, not the defendant Salinger,

were arraigned and pleaded to the Indictment on the 17th day of October, 1922. The defendant Salinger was arrested.

Mr. McCool: How is all this relevant on the question of probable cause?

[fol. 153] Mr. Mattuck: Not competent at all on the question of probable cause. The question that you have just raised is the question of whether or not the defendant is to be given reasonable opportunity to produce the books. I am going to show that he has had reasonable opportunity to get books, make motions and everything else.

Mr. McCool: That is not the question here before the Commissioner.

Mr. Mattuck: You just raised the question.

Mr. McCool: The question is whether we shall have reasonable opportunity now.

Mr. Mattuck: The counsel can very well come in three weeks from now and ask for further reasonable opportunity. I am trying to show that reasonable opportunity has been had by counsel for a long time.

Mr. McCool: I cannot see that that is relevant. We have not had reasonable opportunity to produce the evidence on this hearing.

Mr. Mattuck: I have answered that again by stating that ten days—

Mr. McCool: I say that ten days is not enough.

[fol. 154] Mr. Mattuck: May I be permitted to finish my argument in answer to his for the purpose of the record?

The Commissioner: Yes, I will not stop you.

Mr. Mattuck: The defendant Salinger gave bail in the District of Iowa, Northern District, on the 13th day of June, 1922. Bond in the sum of \$10,000 was given by the defendant Salinger for appearance in South Dakota. Thereafter the trial date was set for the 17th day of October, 1922, at which time the defendant Salinger did not conform to the condition of his bond, did not appear in the District of South Dakota, for trial, and the bond in that District was thereupon ordered forfeited.

It is therefore, submitted with regard to the question of a motion for the return of books or whatever argument it was that Mr. McCool made with regard to further time, that such a motion is being interposed here merely for purposes of delay, because reasonable opportunity for the defendant Salinger was given to him between the dates of the filing of the indictment and certainly between the dates of his furnishing bond for his appearance in South Dakota, and the date of trial, to take such steps as he deemed necessary for the purpose of procuring books and other evidence which he deemed necessary. For the purpose of this hearing, it is again submitted that in view of the stipulation entered into between counsel to proceed on this day that no adjournment should be granted at this time.

Mr. McCool: In answer to that, counsel for the defendant very respectfully but very earnestly objects to any statement that he is [fol. 155] attempting to delay this proceeding. He states his pur-

poses here are to attempt to aid his client, not to impede the progress of the government.

The Commissioner: Is there any motion before me now?

Mr. McCool: Yes, sir, the motion is for reasonable opportunity to get these books which have been enjoined.

The Commissioner: I take it that that is a motion for an adjournment.

Mr. McCool: Yes, sir.

The Commissioner: I shall deny that motion.

Mr. McCool: I respectfully except.

The defendant offers in evidence what purports to be an affidavit of Mr. S. W. Clark, United States Attorney for the District of South Dakota, verified October 17th, 1922, and a copy of an order of transfer granted by the Honorable James D. Elliott, District Judge of the District Court of the United States for the District of South Dakota, Western Division.

You concede, Mr. Mattuck, that those are true copies?

Mr. Mattuck: Yes. That concession should not be taken to mean that there is no objection to their admission in evidence. Yes, I will concede that they are the affidavits. They bear the original signature [fol. 156] of Mr. Clark. They are copies.

Mr. McCool: And that the contents thereof are true?

Mr. Mattuck: And that the contents are true.

Mr. McCool: The defendant offers in evidence a certified copy of an affidavit of S. W. Clark, verified October 17, 1922.

Mr. Mattuck: No objection to those things going in.

Mr. McCool: An an order of the Honorable James D. Elliott, Judge of the United States District Court, District of South Dakota, Western Division, dated October 17th, 1922, transferring the above entitled cause from the Western Division of South Dakota to the Southern Division thereof. I ask that they be marked Defendant's Exhibits A and B.

(Marked Defendant's Exhibits A and B respectively.)

Mr. McCool: The defendant rests and now renews his motion to dismiss.

The Commissioner: Motion is denied.

Mr. McCool: To which the defendant respectfully excepts.
[fol. 157] The Commissioner: Of course, this brings this matter to a conclusion.

NOTE.—The indictment herein, same as Indictment copied at page — of this Transcript.

BENCH WARRANT

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid, on the 20th day of May, A. D. 1922, the

Grand Jurors in and for the said District of South Dakota brought into the said Court, a true bill of indictment against B. I. Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court, may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now, therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota to answer the indictment aforesaid; the bail bond of said defendant having been this day forfeited by the Court.

[fol. 158] Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 18th day of October, A. D. 1922.

Jerry Carleton, Clerk. (Seal of Court.)

Indorsement of warrant: United States District Court, District of South Dakota—Southern Division. Crim. No. 1978, So. Div. The United States of America, Plaintiff, against B. I. Salinger, Jr., Defendant. Warrant. Returned and filed this 20th day of October, A. D. 1922. Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received this warrant on the 18th day of October, 1922, and after a due and diligent search I am unable to find the within-named defendant, B. I. Salinger, Jr., within this District.

W. H. King, U. S. Marshal, By N. H. Jensen, Deputy. (Seal of Court.)

[fol. 159] UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls in said District this 20th day of October, A. D. 1922.

Jerry Carleton, Clerk, By C. C. Schwarz, Deputy. (Seal.)

Exhibit B, motion for transfer from Western Division to Southern Division of District of South Dakota, omitted from the printed record having been heretofore copied at page 84.

* * * * *

DEFENDANT'S EXHIBIT A

In the District Court of the United States, District of South Dakota--
Western Division

[Title omitted]

Order of Transfer—Filed Oct. 17, 1922

Application having been made by the United States Attorney for the District of South Dakota, for a transfer of the above entitled [fol. 160] cause from the Western Division of the District of South Dakota to the Southern Division thereof, said application being presented in open Court and in the presence of the defendant Fred C. Sawyer and of their attorneys, and good cause being shown;

It is now ordered that the above entitled cause be and the same is hereby transferred from the Western Division of the District of South Dakota to the Southern Division of the District of South Dakota, and that all further proceedings herein be had in said Southern Division.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 17th day of October, A. D. 1922.

By the Court.

Attest: Jerry Carleton, Clerk. (Seal of Court.)

[File endorsement omitted.]

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

[fol. 161] In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Sioux Falls, in said District this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk. (Seal of U. S. District Court, Dist. of So. Dakota).

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, James D. Elliott, Judge of the District of the United States, within and for the District aforementioned, the same being a Court of Record, within and for the District aforesaid, do hereby certify that Jerry Carleton is clerk of said Court, and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said Clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Sioux Falls, South Dakota, this 23rd day of October, A. D. 1922.

Jas. D. Elliott, Judge of the District Court of the United States for the District of South Dakota. (Seal of the District Court of the United States for the District of South Dakota).

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States of America within and for the District aforesaid, do hereby certify that the Honorable James D. Elliott, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, [fol. 162] duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District, this 23rd day of October, A. D. 1922.

(Signed) Jerry Carleton, Clerk of the United States District Court for the District of South Dakota. (Seal of the U. S. District Court, Dist. of South Dakota.)

AT A TERM OF THE UNITED STATES DISTRICT COURT HELD IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AT THE COURT HOUSE THEREOF, IN THE BOROUGH OF MANHATTAN, NEW YORK CITY, ON THE 15TH DAY OF NOVEMBER, 1922

[Title omitted]

ORDER DISMISSING WRITS

The writs of habeas corpus and certiorari heretofore allowed to the above named B. I. Salinger, Jr., having duly come on to be heard before the Honorable Julian W. Mack, Circuit Judge, at a term of his Court, held on the 13th day of November, 1922, and after hearing William P. McCool, of counsel for petitioner, in support of said writs, and Maxwell M. Mattuck, Esq., Assistant United States Attorney, [fol. 163] torney, in opposition thereto and due deliberation having been had thereon, on motion of William Hayward, United States Attorney,

Ordered, that said writs be and the same hereby are dismissed.

Enter,

Julian W. Mack, C. P.

THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

WARRANT OF REMOVAL

The President of the United States of America to the Marshal of the United States for the Southern District of New York and to his Deputies or any or either of them:

Whereas, B. I. Salinger, Jr., has been brought before me upon a commitment made by a United States Commissioner in this District for the purpose of obtaining a warrant for the removal of the said B. I. Salinger, Jr., to the District of South Dakota, in which District the offense for which said prisoner has been so committed is to be tried, a copy of which commitment is hereto attached;

And whereas, the United States Attorney for the Southern District of New York has made application to me under the provisions of the Revised Statutes of the United States, for a warrant for the removal of said prisoner to the District of South Dakota, and an examination of the matter having been made by me;

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South [fol. 164] Dakota and there deliver him to the United States Marshal for the District of South Dakota, or some other proper officer authorized to receive said prisoner, in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Southern District of New York, at the Borough of Manhattan, City of New York, this 15th day of November, 1922.

Julian W. Mack, Circuit Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL AND ADMISSION TO BAIL PENDING APPEAL

And now comes B. I. Salinger, Jr., and respectfully represents that on the 13th day of November, 1922, a judgment was entered by this Court dismissing his petition for habeas corpus and certiorari and remanding him in custody of Hon. William Hecht, United States Marshal for the Southern District of New York, awaiting removal to the Western Division of the District of South Dakota.

And your petitioner respectfully shows that in said record proceedings and order in this cause lately pending against your petitioner manifest errors have intervened to the prejudice and injury [fol. 165] of your petitioner, all of which will appear more in detail in the assignment of error which is filed with this petition.

Wherefore, your petitioner prays that an appeal may be allowed him from said order to the United States Circuit Court of Appeals for the Second Circuit, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the Court; that the petitioner may be admitted to bail pending the determination of the appeal to the said Court, and that the petitioner may have thirty days to prepare and file his bill of exceptions herein.

Gilbert, Campbell & Barranco, Attorneys for Petitioner, 14 Wall Street, New York City.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Habeas Corpus

ORDER GRANTING APPEAL AND ADMISSION TO BAIL

On reading of the petition of B. I. Salinger, Jr., for appeal and consideration of the assignment of errors presented therewith it is ordered that the appeal as prayed for be and is herewith allowed. And it appearing to the Court that a citation was duly served as provided by law, it is ordered that petitioner be admitted to bail pending [fol. 166] the final determination of this appeal in the sum of \$10,000, the appeal to operate as a supersedeas.

Costs bond on appeal is hereby fixed in the sum of \$250.00. Petitioner allowed up to and including December 13, 1922, to make and file his bill of exceptions herein.

New York, November 15, 1922.

Julian W. Mack, Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes B. I. Salinger, Jr., by Gilbert, Campbell & Barranco, his attorneys, and in connection with his petition of an appeal, says that in the record and proceedings and order aforesaid, and during the hearing of the above entitled cause in said District Court, error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. The Court erred in not holding that this petitioner and applicant, is wrongfully held and illegally imprisoned, and in dismiss-

ing his petition and remanding his into custody for removal from the Southern District of New York to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and [fol. 167] imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred in dismissing the petition for habeas corpus and remanding appellant into custody for removal.

4. The Court erred in dismissing the petition for certiorari.

5. The Court erred in holding that the Commissioner did not err in receiving into evidence, over the objection and exception of petitioner, certified copy of indictment alleged to have been returned against this petitioner and others by the Grand Jury of the Western Division of the District of South Dakota, and in admitting to evidence certified copy of bench warrant founded on said indictment; and furthermore, in refusing to strike out the said indictment and bench warrant upon the motion of petitioner; and the Court erred further in refusing to sustain the exceptions taken by the petitioner before the Commissioner to the Commissioner's ruling admitting the said documents in evidence and in refusing to strike the same out.

6. The Court erred in refusing to hold that the said Commissioner was in error in his finding that there was probable cause to believe that the petitioner was guilty of the commission of any offense against the United States and in particular of the offense attempted to be set forth in the said indictment.

7. The Court erred in refusing to hold that the Commissioner [fol. 168] erred in his refusal to afford to the petitioner reasonable opportunity of proving that said petitioner was not guilty in fact of any crime against the United States and particularly of the crime attempted to be set forth in said indictment.

8. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof and failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

9. The Court erred in refusing to hold that said indictment and each and every count thereof failed to state facts sufficient to charge the petitioner or any of the defendants named therein with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any division thereof.

10. The Court erred in refusing to find that said indictment and each and every count thereof failed to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the Western Division of the District of South Dakota.

11. The Court erred in refusing to find that if any offense against the laws of the United States was charged in and by said indictment at all (the petitioner maintaining that no such offense was so charged), that such facts as are charged show that no offense was committed by the petitioner or any or all of the defendants named [fol. 169] in said indictment within the District of South Dakota or any Division thereof, and that therefore said indictment and any proceedings thereunder and especially any trial are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States and of the rights under Section Three of Article Three thereof.

12. The Court erred in failing to sustain the petitioner in his protest that said indictment did not charge any offense at all, and if any, none within the jurisdiction of the Court to which said Indictment was returned, and in failing to sustain the petitioner's protest that in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of the District of South Dakota whereas as it appears upon the face of the indictment said indictment was returned at and by a Grand Jury sitting in and for the Western Division of the District of South Dakota.

13. The Court erred in refusing to hold that by reason of the provisions of Section 53 of the Judicial Code of the United States the said Grand Jury sitting in and for the Western Division of the District of South Dakota was entirely without power or authority to return said indictment and said court was without power or authority to receive it and that the District Court of the United States for the Southern District of New York was for like reasons without power or jurisdiction to take any proceedings under said invalid indictment and particularly to arrest or detain or imprison your petitioner upon any warrant issued founded upon said indictment and particularly [fol. 170] without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota and in any event without power to direct the return of your petitioner to the Southern Division of the District of South Dakota in which division in any event no indictment has been found against the petitioner.

14. The Court erred in refusing to hold that the said Grand Jury sitting in and for the Western Division of South Dakota was in any event without power or authority to hear any charge against your petitioner or to return any indictment against him for the reason that said Grand Jury was illegally and unlawfully called and constituted for the reason, among others, that said Grand Jury was not composed of citizens of the United States residing within the Western Division of the District of South Dakota, but that many of the members of said Grand Jury resided in other Divisions of the District of South Dakota and that for that reason were and are disqualified from acting upon the Grand Jury sitting in and for the Western Division of South Dakota.

15. The Court erred further in refusing to hold that subject to the foregoing objections that the evidence presented before the Grand Jury as to all the counts contained in said indictment excepting counts 1, 4, and 6 thereof were insufficient to sustain the indictment for the reason, among others, that no person called as a witness before said Grand Jury had any personal knowledge of whether the letters relied upon in said counts had ever been mailed by petitioner or any of the defendants named or whether said letters had ever been carried by mail or whether they had been delivered to the addresses thereof [fol. 171] by mail and the said letters bearing no evidence of where they had been mailed or delivered, said counts of the indictment were based on the incompetent and hearsay evidence of some or all of the persons whose names are indorsed on the indictment as witnesses before said Grand Jury; and furthermore, said indictment and each and every count thereof is void as being based on incompetent and hearsay testimony and particularly because at the hearing before the Grand Jury there was introduced and used certain books and the legal custodian of said books, although subpœnaed, to appear and actually in attendance upon said Grand Jury to testify to the identity and custody of said records was not called as a witness and did not lay the foundation in the introduction or use thereof, as appears more particularly by the affidavits of Charles H. Rathbun and Samuel W. Huntington, members of the Grand Jury that found said indictment, copies of which affidavits were submitted to the Court upon the petition for habeas corpus herein.

16. The Court erred in refusing to hold that subject to grounds 1 to — inclusive hereof that said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, to vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; furthermore, that said indictment as a whole is needlessly long and involved and contains much redundant and immaterial allegations which defects when taken together render it difficult to construe and almost unintelligible and particularly fails to show that anyone whomsoever was in effect [fol. 172] defrauded by your petitioner or by any of the defendants named in said indictment whether by means of the said letters or otherwise.

17. The Court erred in refusing to hold that the proceedings before the Commissioner was improperly conducted and that no proper or sufficient evidence was introduced thereon to establish that there was probable cause to believe the petitioner guilty of any crime and particularly of the alleged crime attempted to be set forth in the said indictment.

18. The Court erred in refusing to find that the Commissioner erred in refusing to dismiss the proceedings before him and in refusing to grant the motion made by petitioner to dismiss the same and the Court erred further in refusing to sustain the petitioner's exceptions to said ruling of said Commissioner.

19. The Court erred in holding that the return made by William Hecht, Marshal of the United States for the Southern District of New York to the writ of habeas Corpus was sufficient to create an issue and that the facts therein stated were sufficient to justify the said Marshal in detaining your petitioner.

20. The Court erred in refusing to hold that the Court had no jurisdiction of the petitioner for the reasons more particularly hereinbefore set forth and in refusing to find that the Commissioner had no power to order the arrest of your petitioner and in refusing further to find that the Marshal was without power to arrest or imprison him, or the reason that the warrant issued by said Commissioner was based solely upon an alleged indictment which was patently and [fol. 173] manifestly insufficient to charge any crime as more particularly hereinbefore set forth and therefore said warrant was and illegal and without jurisdiction in law and the arrest made thereunder was unwarranted, unjustified and illegal.

21. The Court erred further in finding that the proceeding conducted by the Commissioner was proper and lawful and that the evidence introduced upon the hearing before the Commissioner by the Government was legal evidence and sufficient to establish there was probable cause to believe the petitioner guilty of any crime.

22. The Court erred further in refusing to sustain the petitioner's exceptions to the Commissioner's refusal to allow petitioner to introduce evidence to establish that he was not guilty in fact, such refusal being based upon the sole ground that the Government urged that to permit of such opportunity would inconvenience the District Attorney for the District of South Dakota without proof upon the part of the Government that the affording of such reasonable opportunity would in any wise prejudice the United States of America.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

Gilbert, Campbell & Barranco, Attorneys for Petitioner and Appellant.

MEMO. AS TO BOND

Approved appeal and supersedeas bail bond, filed Nov. 14, 1922.
(not printed).

[fol. 174] CITATION ON APPEAL—Omitted in printing

[fol. 175] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CLERK'S MEMO. ON DOCKET

Docket Entries

Attorneys: Gilbert, Campbell & Barranco, 14 Wall St., N. Y. C.
 1922.

Nov. 8. Filed, Petition for Habeas Corpus and Certiorari and issued Writ—Ret. 11, 13, 22.
 Nov. 9. Filed, Bond, \$10,000—Southern Surety Co.
 Nov. 11. Filed, Affdt. of U. S. Marshal, S. D. of N. Y. as to missing Writ.
 Nov. 14. Filed, Affdt. of U. S. Marshal, Wm. C. Hecht.
 Nov. 14. Filed, Order dismissing Writs.
 Nov. 14. Filed, Assignment of Errors.
 Nov. 14. Filed Petition and order allowing appeal.
 Nov. 14. Filed, Writ of Certiorari.
 Nov. 14. Filed, Writ of H. C.
 Nov. 14. Filed, Citation on appeal to C. C. A. Ret.
 Nov. 17. Filed, Bond—\$10,000—Southern Surety Co.
 Nov. 8. Filed, Bond for Costs \$250—Southern Surety Co.
 Dec. 12. Filed, And issued Writ of Error.

A true copy.

Alexander Gilechrist, Jr., (Clerk). (Seal.)

[fol. 176] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO CERTIFY RECORD

On reading the annexed preceipe and stipulation dated December 26, 1922, by and between the attorneys for petitioner and the United States Attorney, in the above case, it is

Ordered, that the clerk certify the transcript of record on the appeal taken by the plaintiff from order dismissing writs of habeas corpus and certiorari in accordance with said stipulation and preceipe.

Dated, N. Y., December 27, 1922.

J. W. Mack, U. S. C. J.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD

It is hereby stipulated that the clerk of the District Court of the United States for the Southern District of New York may certify the transcript of record on the appeal in accordance with the praecipe hereto annexed.

[fol. 177] Dated, December 26, 1922.

Gilbert, Campbell & Barrance, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

PRÆCIPÉ FOR TRANSCRIPT OF RECORD

Counsel for the respective parties agree that the following and no other papers constitute the transcript of record:

Indictment, complaint, warrant, commitment, bench warrant, bill of exceptions, petition for leave to appeal, order allowing appeal, assignment of errors, petition for writ of habeas corpus and certiorari, writ of error, orders extending time to file record, writ of habeas corpus, writ of certiorari, return to writs, warrant of removal, order dismissing writs, citation on appeal, præcipe, stipulation on præcipe, order approving præcipe, stipulation re certification, clerk's certificate.

Dated, December 26, 1922.

Gilbert, Campbell & Barrance, Attorneys for Petitioner.
William Hayward, U. S. Attorney.

[fol. 178] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York,

do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 27th day of December, in the year of our Lord One Thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

Alexander Gilchrist, Jr., Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 140 inclusive, contain a true and complete transcript of the record on appeal filed in this Court in the case of [fol. 179] In the matter of: B. I. Salinger, Jr., as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 13th day of April in the Year of our Lord One Thousand Nine Hundred and Twenty-three and of the Independence of the United States the one hundred and forty-seventh.

(Signed) Wm. Parkin, Clerk. (Seal.)

EXHIBIT IN EVIDENCE: BOND ON REMOVAL TO THE DISTRICT OF
SOUTH DAKOTA

Filed April 20, 1923

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered that on this 20th day of March, in the year of our Lord, one thousand nine hundred and twenty three, before me Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, in the Second Circuit, personally came B. I. Salinger, Jr., principal, and Southern Surety Company of Des Moines, Iowa, Surety, and acknowledged themselves to owe to the United States of America, that is to say, the said B. I. Salinger, Jr., the sum of Fifteen thousand (\$15,000) Dollars, and the said Southern Surety Company of Des Moines, Iowa, the sum of fifteen thousand (\$15,000) Dollars separately to be levied and made [fol. 180] of their respective goods and chattels, lands and tenements to use of the said United States of America, if default shall be made in the following conditions following, to-wit:

Now therefore the conditions of this recognizance are such that if the said B. I. Salinger, Jr., shall appear for trial at the District Court of the United States for the District of South Dakota, to be holden at the City of Sioux Falls in said District on the First Tuesday of April, 1923, at 10:30 o'clock in the forenoon of said day, upon an indictment filed in said district, Southern Division, and shall appear before said District Court of the United States for the District of South Dakota, on such day or days thereafter as said District Court may order, and shall at all times render himself amenable to the order and process of the said Court, to answer all such things and matters as shall be objected against him, and not depart the jurisdiction of the Court without leave; and if convicted shall appear for judgment, and render himself in execution thereof upon such day as said District Court may order, then this recognizance to be void, otherwise to remain in full force and virtue.

B. I. Salinger, Jr., Principal. Southern Surety Company.
By Hubert T. C. Beardsley, Attorney in Fact. (Seal.)

Acknowledged before me the day and year first above written.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York.

[fol. 181] A true copy.

(Signed) Alex Gilchrist, Jr., Clerk. (Seal.)

**EXHIBIT IN EVIDENCE: COPY OF ORDER ON MANDATE OF U. S.
CIRCUIT COURT OF APPEALS, SECOND CIRCUIT—Filed April
20, 1923**

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, to-wit, Order on Mandate, in case of B. I. Salinger, Jr., Miscellaneous Docket 7/356, filed in this Court on March 16, 1923, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals. In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this second day of April, in the year of our Lord, One Thousand Nine Hundred and twenty-three, and of the Independence of the said United States the One Hundred and Forty-seventh.

(Signed) Alex. Gilchrist, Jr., Clerk. (Seal.)

AT A STATED TERM OF THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK HELD AT THE UNITED
[fol. 182] STATES COURT HOUSE AND POST OFFICE BUILDING, IN THE
BOROUGH OF MANHATTAN, CITY OF NEW YORK, ON THE 16TH DAY
OF MARCH, 1923

Present: Hon. Augustus N. Hand, District Judge.

M 7-356

In the Matter of B. I. SALINGER, JR., Petitioner in Habeas Corpus

This cause having heretofore come on for hearing in this Court upon writs of habeas corpus and certiorari allowed to the above named B. I. Salinger, Jr., and an order having been entered in said cause dismissing said writs, and the said B. I. Salinger, Jr., having thereafter by an appeal obtained a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals having transmitted to this Court its mandate dated March 14th, 1923, by which it appears that, at the October Term of said Court for 1922, this cause came on to be heard and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the order of said District Court be affirmed and that such further proceedings be had in said cause, in accordance with the decision of the said United States Circuit Court of Appeals as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Now upon reading and filing said mandate and upon motion of William Hayward, United States Attorney for the Southern District of New York, it is hereby

[fol. 183] Ordered, adjudged and decreed that the judgment and order of the said United States Circuit Court of Appeals in this Cause be and the same is hereby made the judgment of this Court, and it is further

Ordered that the said B. I. Salinger, Jr., personally surrender himself into the custody of the United States Marshal for the Southern District of New York, New York, N. Y., on or before the 19th day of March, 1923, at 10:30 o'clock in the forenoon, and that the said United States Marshal transport the said B. I. Salinger, Jr., to the District of South Dakota, and there deliver the said B. I. Salinger, Jr., into the custody of the United States Marshal for said District, then and there to be dealt with according to law.

(Signed) Augustus N. Hand, United States District Judge.

EXHIBIT IN EVIDENCE: MINUTE ENTRIES OF U. S. DISTRICT COURT,
DISTRICT OF SOUTH DAKOTA—Filed April 20, 1923

In the District Court of the United States of America in and for the
Southern Division of the District of South Dakota

At a session of the District Court of the United States for the District of South Dakota, continued and held pursuant to adjournment, in the United States Court Room, in the City of Sioux Falls, in the District of South Dakota, on the 3rd day of April, A. D. 1923, the [fol. 184] Honorable James D. Elliott, Judge, being present and presiding in said Court, the following among other proceedings were had and done, to-wit:

Indictment No. 1978, S. D.

[Title omitted]

Order Setting Certain Motions for Hearing

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the arraignment of the defendant, B. I. Salinger, Jr., and said defendant not appearing in Court, and having been three times severally called at the Court room door by the United States Marshal to appear in Court, as he was bound to do, or forfeit his bond, and having made default said United States District Attorney S. W. Clark, Esq., moves the Court for the forfeiture of the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, heretofore given for his appearance before this Court at this time; and said United States District Attorney also moves the Court for a bench warrant to issue forthwith for the arrest of said defendant; whereupon, it is ordered, by the Court, that the hearing on said motions, be and the same is hereby set down for April 4th, A. D. 1923, at two o'clock in the afternoon, and the United States District Attorney is directed to so notify the attorney for said defendant.

And afterwards, to-wit, on the 4th day of April, A. D. 1923, the following among other proceedings were had and done, to-wit:

[fol. 185] Indictment No. 1978, S. D.

[Title omitted]

Order Forfeiting Bail Bond

This being the time fixed by the Court for hearing, the motion for the forfeiture of the bail of defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, under Indictment No. 1978 S. D., and the matter coming on for hearing, the Court directs the Marshal

to call said defendant three times at the door of the Court room, the Marshal reports that he has so called the said defendant and that said defendant failed to appear; and the United States District Attorney, S. W. Clark, Esq., having renewed his motion for the forfeiture of the bail bond of B. I. Salinger, Jr., which had heretofore been presented to this Court in the sum of Fifteen Thousand Dollars, conditioned for the appearance of B. I. Salinger, Jr., before this Court on the 3rd day of April, A. D. 1923, at the opening of the term, the Court states that in his opinion the defendant has not only disregarded his duty under his obligation, as set forth in the terms of this bond to appear here, but that he has resorted, to say the least, to most questionable methods; that he has no confidence whatever in the position assumed by counsel for defendant that this defendant could by collusion with a bonding company go to a distant jurisdiction and surrender himself there and that a United States Commissioner could fix a bond of \$5,000.00, the terms of which are entirely unknown to this jurisdiction at this time, and thereby relieve him from the necessity of fulfilling the obligation of this bond by surrendering himself here for trial; whereupon, it is ordered by the Court, that the bail bond of said defendant, B. I. Salinger, Jr., in the sum of Fifteen Thousand Dollars, conditioned as above stated be, and the same is hereby forfeited; and it is further ordered that the Clerk of this Court file the telegrams presented by the United States Attorney relating to the present whereabouts of said defendant.

And, to-wit, on the same day, the following among other proceedings were had and done, to-wit:

[Title omitted]

Order for Bench Warrant

Now at this time comes S. W. Clark, Esq., United States District Attorney, and moves the Court for the issuance of a bench warrant for the arrest of B. I. Salinger, Jr., by reason of the forfeiture of his bond, and the fact that he is under indictment and has not responded; whereupon, it is ordered by the Court, that a warrant issue forthwith for the arrest of the said defendant, B. I. Salinger, Jr., returnable forthwith at Sioux Falls, South Dakota.

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that the above and foregoing are true copies of the entries made upon the Journal of the proceedings of said Court, in the case therein entitled; that [fol. 187] I have compared the same with the original entries thereof, and the same is a true transcript therefrom, and of the whole thereof.

Witness my official signature and the seal of said Court, at Sioux Falls, this 5th day of April, A. D. 1923.

(Signed Jerry Carleton, Clerk, By C. C. Schwarz, Deputy.
(Seal.)

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the assistant United States attorney for the Eastern [fol. 188] District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me: Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the City of New Orleans, this 20th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

FINAL MITTIMUS

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the Keeper of the House of Detention in the City of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May,

1922, in said District, in violation of Sec. 215 CC. of the United States, unlawfully used the mails with a scheme to defraud.

[fol. 189] And, after an examination being this day had by me, it appearing to me that said offense had been committed and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April, 1923, and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I. Salinger, Jr., to the custody of the keeper of said jail of the city of New Orleans, and to leave with said jailer a certified copy of this writ; and to command you, the keeper of said jail of said city, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

Received this Mittimus with the within named Prisoner, on the 18 day of April, A. D. 1923, and on the same day I committed the said Prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

[fol. 190] Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana.

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

[Title omitted]

Extract from the Judgment Book, February Term, 1923

JUDGMENT

New Orleans, Thursday, April 26th, 1923.

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein and after hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the [fol. 191] application of the relator for a writ of habeas corpus be, and the same is hereby denied, that the said petition of the relator be dismissed with costs and that the said relator Ben. I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal, for this District.

Judgment rendered April 26th, 1923.

Judgment signed April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 26, 1923

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division.

The undersigned petitioner, B. I. Salinger, Jr., feeling himself [fol. 192] aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana, in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for writs of habeas corpus and certiorari," and numbered therein 17238 and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D. 1923, ordering that the writs of habeas corpus and certiorari heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment may be allowed to him to the said Supreme Court of the United States in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation, the said appeal may operate as supersedeas until the final disposition of the case by the Supreme Court of the United States.

And in support of this petition, your petitioner herewith presents and files his assignments of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner. (Signed) St. Clair Adams, His Attorney.

[fol. 193] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day, this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith.

It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said [fol. 194] B. I. Salinger, Jr., shall enter into an undertaking in the sum of One Hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Fifteen thousand Dollars, with sureties to be approved by the Clerk of the United States District Court, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans, La., this 27 day of April, A. D. 1923.

(Signed) Rufus E. Foster, Judge United States District Court,
Eastern District of Louisiana.

[fol. 195] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with his petition for appeal by writ of error, in the above entitled cause, filed herewith his assignment of errors which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings

therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into the custody for [fol. 196] removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the Amendments thereto.

3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of Section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in any view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the Biggerstaff v. U. S. (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said Section 53, that "all prosecutions shall be had in the Division in which [fol. 197] committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the offense was committed and said decision is in opposition to the decision of the Supreme Court of the United States in Post v. U. S. 161 U. S. 583; 16 Sup. Ct. 611; Virginia 148 U. S. 107; 13 Sup. Ct. 586 and Chennault v. U. S. 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The Biggerstaff case should not have been followed for the further reason that it proceeds in contradiction of the rules that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; therefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth Amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in *Stever v. U. S.* 222, U. S. 167, and in *U. S. v. Stewart* (C. C. A.) 119, Fed. 89, and *U. S. v. Conrad*, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and Section three of Article three of the Constitution of the United States.

9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two coindictees, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by way of the letters counted on other than those which it is charged he himself wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it *is* be said that in the *Stever* case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy in mailing, etc., at Sioux City, Iowa.

[fol. 199] 13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged

scheme for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge [fol. 200] this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States.

18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendant named in said indictment, whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error.

[fol. 201]

[Title omitted]

BAIL BOND—Filed April 27, 1923

Know all men by these presents: That we, B. I. Salinger, Jr., as principal and Southern Surety Company, herein represented by J. H. Bodenheimer, agent and attorney in fact, as surety, are held and firmly bound unto the United States of America, in the full sum of Five Thousand (\$5,000.00) Dollars, to be paid to the said

United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents:

Sealed with our seals, and dated this 27th day of April, in the year of our Lord, 1923.

Whereas, B. I. Salinger, Jr., has been granted an order of appeal herein to the Supreme Court of the United States in the above entitled cause; and given the notice of the taking of such appeal.

Now, the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall be and appear before the said Supreme Court of the United States, at and during the present term thereof, and from day to day thereafter, and shall be and appear before the [fol. 202] said Court at the next regular or special term thereof, on the first day thereof, and from day to day thereof and term to term thereafter until finally discharged therefrom, and to abide the order and judgment of the said United States Supreme Court, and not to depart the Court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said Court may direct if the judgment of said U. S. District Court, Eastern District of Louisiana, New Orleans, in this cause, shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, Attorney.

(Signed) Southern Surety Co., By J. H. Bodenheimer
(Seal), Agent & Attorney in Fact.

Approved:

(Signed) H. J. Carter, Clerk, U. S. District Court.

APPEAL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. [fol. 203] Bodenheimer, as surety, are held and firmly bound unto the United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, in the full and just sum of One hundred (\$100.00) dollars to be paid to the said United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of April, in the year of our Lord, one thousand nine hundred and twenty three.

Whereas, lately at a session of the United States District Court holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., plaintiff

and the United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, defendants, a judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal, and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, and Victor Loisel, as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Supreme Court, to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and [fol. 204] answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) B. I. Salinger, Jr., (Seal), By St. Clair Adams (Seal). (Signed) Southern Surety Co. (Seal), By J. H. Bodenheimer (Seal), Agent & Atty. in Fact.

Approved by—

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS No. 17238—Filed April 18, 1923

To the Honorable the District Court of the United States in and for the Eastern District of Louisiana, in the Fifth Judicial Circuit:

The petition of B. I. Salinger, Jr., respectfully shows:

1. That petitioner is a resident of Sioux City, in the State of Iowa, and is a citizen of said State and of the United States of America.

[fol. 205] 2. That petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States in the custody of Victor Loisel, Esquire, United States Marshal in and for the Eastern District of Louisiana, to-wit; at the City of New Orleans in the said District.

3. That the sole claim and the sole authority by virtue of which the said Victor Loisel, Marshal as aforesaid, so restrains and detains your petitioner, is a certain paper which purports to be a commit-

ment in writing, a copy of which is hereunto annexed and marked for identification herewith Petitioner's Exhibit "A."

4. That, upon information and belief, the said commitment was issued by Arthur H. Brown, Esquire, United States Commissioner, by virtue of a certain indictment found against petitioner in the proceeding entitled "United States versus B. I. Salinger, Jr., No. 983 W. D. in the District Court of the United States for the District of South Dakota, Western Division," charging petitioner with the violation of Article 215 of the Penal Code of the United States, with reference to using the mails to defraud, all of which will more fully and at large appear by reference to a copy of said indictment hereto annexed as part hereof and for identification herewith marked "Petitioner's Exhibit B."

5. That petitioner did not commit the crime of using the mails to defraud as set forth in said indictment or otherwise within the jurisdiction of the said District of South Dakota or elsewhere, and upon information and belief that he had no connection whatever [fol. 206] with the mailing or causing to be delivered of any letter set out in the indictment, unless it be those charged to have been signed by him (and as to them he cannot say for he has not been permitted any inspection of them) and that if he had anything to do with any of them, it could only have been in the State of Iowa for he was never in the State of South Dakota at any time between the dates of the first letter set out and the date of the last one, nor at the time of nor since the return of said indictment.

6. That said indictment is void and your petitioner's detention illegal, and in denial of his rights under the Constitution of the United States, and particularly under the Fifth and Sixth Amendments thereof, and under Section Two of Article Three thereof, because:

(a) Said indictment and each and every count thereof fails to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and fails to describe any crime or offense in violation of or punishable under any of the laws of the United States.

(b) Said indictment and each and every count thereof fails to state facts sufficient to charge the petitioner or any of the defendants therein named with the commission of any crime or offense against the United States or any law thereof within the District of South Dakota or any Division thereof.

(c) Said indictment and each and every count thereof fails to state facts sufficient to charge petitioner or any of the defendants therein named with the commission of any crime or offense against [fol. 207] the United States or any law thereof within the Western Division of the District of South Dakota.

(d) Said indictment shows on its face that the letters made the basis of the charge therein, were of such character and written at such times as to have been incapable of being in execution of furtherance of any scheme to defraud, because the indictment and said letters show that whatever scheme is alleged to have been devised had been fully executed before the letters are charged to have been written or mailed.

(e) If any offense against the laws of the United States be charged at all, and your petitioner says that no such offense is so charged, such facts as are charged show that no offense was committed by your petitioner or by any or all of the defendants named in said indictment within the District of South Dakota, or any Division thereof, and that therefore said indictment and any proceedings thereunder, and especially any trial, are and would be in violation of the rights of petitioner under the Fifth and Sixth Amendments of the Constitution of the United States, and of his rights under Section two of Article Three thereof.

(f) Petitioner protesting that said indictment does not charge any offense at all, and if any, none within the jurisdiction of the Court to which said indictment was returned, in any event such offense as may be found to be charged in the indictment is charged to have been committed, at least according to the conclusion of the pleader, in the Southern Division of South Dakota, whereas the [fol. 208] indictment was returned at and by a Grand Jury sitting in and for the Western Division of South Dakota.

(g) Petitioner further says that by reason of the provisions of Section 53 of the Judicial Code of the United States, said Grand Jury was entirely without power or authority to return said indictment, and said Court was without power or authority to receive it, and that the defendant Marshal is now for like reasons without power or jurisdiction to take any proceedings under said invalid indictment, and particularly to arrest or detain or imprison your petitioner, upon any warrant issued that it founded upon said indictment, and particularly without power or jurisdiction to direct the removal of your petitioner to the District of South Dakota, and in any event, has no power — direct the return of your petitioner to the Southern Division of the District of South Dakota, wherein no indictment has been found against your petitioner, and your petitioner says that any detention, removal or trial under said indictment, or by virtue of any process thereunder, would be in violation of the Fifth and Sixth Amendments to and of Section Two of Article Three of the Constitution of the United States.

7. That petitioner shows further than no motion has ever been made by him or for him with his consent for the transfer of the proceedings under said indictment from the Western Division of the District of South Dakota, where it was returned, to any other place or division, but that in his absence from said District, and without his motion or consent, the said indictment and all proceed-

ings thereunder, were upon the motion of the Government, by the Court then sitting in the Southern Division of the District of South [fol. 209] Dakota, transferred to that last named division, and that petitioner's detention for the removal to said Southern Division of the District of South Dakota, is and any such removal would be, in violation of petitioner's rights under the Constitution of the United States, and particularly of those parts specifically referred to in other places in this petition.

8. Upon information and belief, the said commitment is, for these and other reasons, absolutely void, and your petitioner is now confined and deprived of his liberty, in violation of the Constitution of the United States, and in violation of the statutes of the United States, and will, if the writ herein prayed for be not granted, be under color of said void indictment and commitment, removed to the Southern Division of the said District of South Dakota, or be compelled to enter into security for his appearance there, or be so removed to or compelled to give security for his appearance at some other place within the said District of South Dakota.

Wherefore, your petitioner prays that a writ of habeas corpus may issue directed to the said Victor Loisel, Esquire, Marshal of the United States, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this Court at a time to be by this Court determined, together with the true cause of the detention of *your* petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue directed to the said Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said [fol. 210] proceedings which resulted in the issue of the said commitment; and that this Court may proceed in the summary way to determine the facts of this case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require.

And your petitioner will ever pray.

Dated at the City of New Orleans, the eighteenth day of April, A. D. 1923.

(Signed) St. Clair Adams, Attorney for Petitioner.

Jurat showing the foregoing was duly sworn to by B. I. Salinger, Jr. omitted in printing.

[fol. 211] IN UNITED STATES DISTRICT COURT, EAST DIST. OF LA.

ORDER ISSUING WRIT

Now on this eighteenth day of April, A. D. 1923, the above matter coming on upon the petition for the issuance of a writ of habeas

corpus, it is hereby ordered that said writ issue as in said petition prayed, returnable to and before this Court at 11 o'clock, A. M., of the 20th day of April, A. D. 1923; and the petitioner is hereby admitted to bail pending said hearing in the sum of Fifteen Thousand 00/100 Dollars, and ordered released upon giving satisfactory security for his appearance on said return day or at such further time as the Court may from time to time direct; and it is hereby further ordered that writ of certiorari issue herein, directed to Arthur H. Brown, Esquire, United States Commissioner for the Eastern District of Louisiana directing him to certify to this Court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issuance of the said commitment, returnable to and before this Court at 11 o'clock A. M. of the 20th day of April, A. D. 1923.

By the Court.

(Signed) Rufus E. Foster, Judge.

[fol. 212] REPORT OF HEARING APRIL 20, 1923—Filed May 2, 1923

No. 17,238

[Title omitted]

Proceedings Had in the Above Entitled and Numbered Matter on Hearing in Open Court Before the Hon. Rufus E. Foster, Judge, on the 20th Day of April, 1923.

Proceedings on hearing for Writ of Habeas Corpus in cause #17238 identical with proceedings in cause #17233 heretofore copied at page 96.

* * * * *

EXHIBIT IN EVIDENCE: BENCH WARRANT—Filed April 20, 1923

(Signed) By Jerry Carleton, Clerk

UNITED STATES OF AMERICA,
District of South Dakota:

To the Marshal of the United States for the District of South Dakota and to his Deputies or any or either of them:

Whereas, at a term of the District Court of the United States, for [fol. 213] the District of South Dakota, begun and held at Deadwood, within and for the District aforesaid on the 20th day of May, A. D., 1922, the Grand Jurors in and for the said District of South Dakota, brought into the said Court, a true bill of indictment against, B. I.

Salinger, Jr., charging him with the crime of using the United States mails to defraud, as by said indictment now remaining on file, and of record in the said Court may more fully appear, to which said indictment the said B. I. Salinger, Jr., has not yet appeared or pleaded.

Now therefore, you are hereby commanded in the name of the President of the United States to apprehend the said B. I. Salinger, Jr., and bring his body before the said Court at Sioux Falls, South Dakota, to answer the indictment aforesaid, the bail bond of said defendant having been this day forfeited by order of the Court.

Witness, the Honorable James D. Elliott, Judge of said United States District Court, District of South Dakota, and my hand and seal of said Court, at Sioux Falls, this 4th day of April, A. D. 1923.

(Sgd.) Jerry Carleton, Clerk, By C. C. Schwartz, Deputy.
(Seal of Court.)

UNITED STATES OF AMERICA,
District of South Dakota, ss:

Received the within warrant on the 4th day of April, 1923, and after a due and diligent search I am unable to find the within-named defendant Ben I. Salinger, Jr., within this District.

W. H. King, United States Marshal, By N. H. Jensen, Deputy.

[fol. 214] UNITED STATES OF AMERICA,
District of South Dakota, ss:

I, Jerry Carleton, Clerk of the District Court of the United States for the District of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Sioux Falls, in said District this 5th day of April, A. D. 1923.

(Signed) Jerry Carleton, Clerk, By C. C. Schwartz, Deputy
(Seal.)

IN UNITED STATES DISTRICT COURT

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his Deputies or any or either of them:

Whereas: Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the pur-

pose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

[fol. 215] And whereas the assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me; Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States, for the Eastern District of Louisiana, at the city of New Orleans, this 26th day of April, 1923.

(Signed) Rufus E. Foster, Judge.

IN UNITED STATES DISTRICT COURT

FINAL MITTIMUS

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

The President of the United States of America to the Marshal of the Eastern District of Louisiana, and to the Keeper of the House of Detention in the City of New Orleans, Greeting:

Whereas, Ben I. Salinger, Jr., has been arrested upon oath of L. [fol. 216] P. Bryant, Jr., for having, on or about the 20 day of May 1922, in said District, in violation of Sec. 216 CC. of the United States, unlawfully use- the mails with a scheme to defraud.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben I. Salinger, Jr., committed said offense as charged, I have directed that said Ben I. Salinger, Jr., be held to bail in the sum of \$15,000 to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 day of April, 1923, and from time to time thereafter to which the case may be continued and he having failed to give the required bail:

Now these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Ben I.

Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you, the Keeper of said Jail of said City, to receive the said Ben I. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

[fol. 217] Received this Mittimus with the within named prisoner, on the 18 day of April, A. D. 1923, and on the same day I committed the said prisoner to the custody of the jail keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated April 18, 1923.

(Signed) Victor Loisel, United States Marshal, Eastern District of Louisiana.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

[Title omitted]

RETURN OF U. S. COMMISSIONER—Filed April 20, 1923

Return of Commissioner to the District Court of the United States for the Eastern District of Louisiana in Response to the Writ of Certiorari Issued Out of said Court on the 18th Day of April, 1923.

Comes now Arthur H. Browne, United States Commissioner for the Eastern District of Louisiana, and in response to the writ of certiorari to him directed by the Honorable Rufus E. Foster, Judge of said District Court, of date April 18th, 1923, shows the following proceedings had before him as such Commissioner in the above matter.

[fol. 218] April 6th, 1923.—Verified complaint filed by L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, same being hereto attached together with a certified copy of the indictment referred to in said complaint.

April 6th, 1923.—Warrant of arrest issued and placed in hands of Marshal for service, same being hereto attached;

April 6th, 1923.—Defendant B. I. Salinger, Jr., was brought before me by the United States Marshal for the Eastern District of Louisiana, under the warrant of arrest above specified, and arraigned, whereupon he applied for bond and bond for his appearance was

fixed in the sum of \$15,000. Defendant gave bond for his appearance before me in said sum \$15,000, and the case was subsequently fixed for hearing before me on April 16th, 1923, at 11:00 a. m. and thereafter the hearing was continued by me to April 18, 1923 owing to the fact that the accused was unable to be present.

Plaintiff appeared through L. P. Bryant, Jr., Assistant United States Attorney for the Eastern District of Louisiana, and S. W. Clark, United States Attorney for the District of South Dakota, and defendant appeared, in person, and by his attorney, St. Clair Adams, and the following proceedings were had:

Defendant made an application for a continuance but upon objection to same by plaintiff and no good cause being shown for continuance, motion was denied:

Plaintiff offered in evidence the certified copy of the indictment returned by the Grand Jury for the District of South Dakota, attached to the complaint and hereinbefore referred to. No objection on the part of the defendant and same was received.

[fol. 219] Plaintiff offered in evidence certified copy of bench warrant issued by Honorable James D. Elliott, United States District Judge, District of South Dakota, of date April 4th, 1913. No objection and same was received in evidence and is hereto attached.

Request being made of defendant's attorney as to whether he would admit defendant's identity, he refused to admit identity and thereupon oral evidence was received proving the identity of defendant with the person named in the indictment, and documentary evidence in the form of a certified copy of the petition for writ of habeas corpus theretofore filed in the United States District Court for the Eastern District of Louisiana by the defendant, B. I. Salinger, Jr., wherein he declares himself to be one and the same party as the B. I. Salinger, Jr., referred to in the indictment returned by the Grand Jurors for the District of South Dakota, certified copy of which said petition for writ of habeas corpus is hereto attached and made part of this return.

After reception of above evidence the Government rested its case:

The defendant did not offer any evidence, and it appearing to the Commissioner that there is probable cause to believe that a public offense has been committed, as specified in the complaint and indictment, and that the defendant, B. I. Salinger, Jr., is guilty thereof, thereupon, it was, by the Commissioner ordered, that the said B. I. Salinger, Jr., be committed to the District Court for the Eastern District of Louisiana, to await further action by said Court in accordance with law.

[fol. 220] A commitment was thereupon issued in the form of the copy hereto attached, and delivered to the United States Marshal for the Eastern District of Louisiana, for the detention of the said B. I. Salinger, Jr.

Neither party requested stenographic notes as to oral testimony taken and record was not kept thereof.

The foregoing, together with the Exhibits hereto attached, constitutes a full and complete record of the proceedings had before me

in the above entitled matter, all of which is herewith transmitted to the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana in response to the writ of certiorari to me directed.

Given under my hand and seal, this 18th day of April, 1923.

(Signed) A. H. Browne, U. S. Commissioner. (Seal.)

Petition for writ of habeas corpus in cause No. 17,238 omitted from the printed record, having been heretofore copied at page 204.

* * * * *

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Clerk's Office

I certify the foregoing to be a true copy from the original record in this office.

[fol. 221] Witness my hand, and the seal of the said Court, at New Orleans, Louisiana, this 18 day of April, A. D. 1923.

(Signed) H. J. Carter, Clerk. (Seal.)

Commitment omitted from the printed record, having been heretofore copied at page 215.

* * * * *

Bench Warrant issued in District of S. Dakota omitted from the printed record, having been heretofore copied at page 212.

* * * * *

BOND FOR APPEARANCE

UNITED STATES COURTS.

Eastern District of Louisiana,
City of New Orleans, ss:

Be it remembered, that on this 6th day of April, 1923, A. D., before me, Henry J. Carter, a Clerk of the District Court of the United States for the said Eastern District of Louisiana, personally came B. L.

Salinger, Jr., residing at Sioux City, Iowa, as Principal, American Surety Company of New York, a Corporation, as Surety, and, jointly and severally acknowledged themselves to owe the United States of America the sum of Fifteen Thousand (\$15,000.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

[fol. 222] The condition of the Recognizance is such, that if the said B. I. Salinger, Jr., shall personally appear before the United States Commissioner for the Eastern Dist. of La. in and for the District aforesaid, at New Orleans, La., at 11 A. M., on the 16 day of April, A. D. 1923, and from day to day thereafter until lawfully discharged, and then and there to answer the charge of having on or about the — day of — within said district, in violation of Section 215 C. C. of the Revised Statutes of the United States, unlawfully — and then and there abide the judgment of the said Court and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

(Signed) B. I. Salinger, (L. S.) (Signed) American Surety Company of New York, By Chas. Hoffmann, Resident Vice-Pres. Attest: F. M. Cobb, Resident Assistant Secretary. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Signed) H. J. Carter, Clerk, U. S. District Court, E. D. of La. (Seal.) (Signed) H. C. Moseley, (Signed) W. L. Brown, Notaries.

[fol. 223] Sworn to and subscribed before me, this 6 day of April, A. D. 1923. (Signed) A. H. Browne, U. S. Commissioner for the Eastern District of La.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

No. 7554.

[Title omitted]

WARRANT FOR ARREST

The President of the United States of America to the U. S. Marshal for the Eastern District of Louisiana or either of his lawful Deputies, Greeting:

You are hereby commanded to take and apprehend and bring before me the body of Ben I. Salinger, Jr., at my office then and there to answer to a charge on affidavit hereto annexed made against said Ben I. Salinger, Jr., per notary, Sec. 215 C. C. And what you do in the premises make return to me.

[fol. 224] Witness my hand in the City of New Orleans, State of Louisiana, this 6 day of Apl., 1923.

(Signed) A. H. Browne, United States Commissioner. (Seal.)

UNITED STATES OF AMERICA,
Eastern District of Louisiana
New Orleans Division, ss:

No. 7554

AFFIDAVIT OF L. P. BRYANT, JR.

Before me, Arthur Horace Browne, a United States Commissioner for the Eastern District of Louisiana, New Orleans Division, personally appeared this day L. P. Bryant, Jr., who being first duly sworn, deposes and says that on or about the 20th day of May, A. D. 1922, at Sioux Falls, South Dakota, in the Western District of South Dakota an indictment was duly filed by the Grand Jury, indorsed as Number 983 of the Docket of United States District Court for said District in which are Ben I. Salinger, Jr., was made defendant, and charged with others therein named with having devised a certain scheme to defraud and in the execution thereof with having unlawfully, feloniously and knowingly, caused to be mailed and delivered by United States Mail certain numerous letters described in the various counts of said indictment, all in violation of Sec. 215 of the United States Criminal Code, which said indictment is referred to as part hereof, that the said Salinger is a fugitive from Justice and now within the Eastern District of Louisiana, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

[fol. 225] Deponent further says that he has reason to believe that S. W. Clark — — — are material witnesses to the subject matter of the complaint.

(Deponent's signature:) (Signed) L. P. Bryant, Jr. (Seal.)

Sworn to before me, and subscribed in my presence, this 6 day of Apr., A. D. 1923. (Signed) A. H. Browne, United States Commissioner. (Seal.)

NOTE.—Certified copy of the Indictment returned in the District Court of the United States for the Western Division of the District of South Dakota, on May 3rd, 1922, same as the copy of Indictment copied at page 13 of this transcript.

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

This cause came on at a former day to be heard upon the application of the relator for a writ of habeas corpus herein, and after [fol. 226] hearing the pleadings and the evidence and testimony offered on behalf of the respective parties, and arguments of counsel, the cause was submitted when the Court took time to consider;

Whereupon, and on due consideration thereof, and for the reasons of the Court orally assigned;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be and the same is hereby denied, that the petition of the relator be dismissed with costs, and that the said relator, Ben I. Salinger, Jr., be remanded to the custody of Victor Loisel, United States Marshal for this District.

Judgment rendered April 26th, 1923.

Judgment signed April 26th, 1923.

(Signed) Rufus E. Foster, Judge.

[fol. 227] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

April 27th, 1923.

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

The undersigned petitioner, B. I. Salinger, Jr., feeling himself aggrieved by the proceedings, orders and rulings had in the District Court of the United States for the Eastern District of Louisiana, in a case therein pending, entitled "In the Matter of the Petition of B. I. Salinger, Jr., for writs of habeas corpus and certiorari," and numbered therein 17238, and particularly by an order of said Court rendered and entered therein on the twenty-sixth day of April, A. D. 1923, ordering that the writs of habeas corpus and certiorari heretofore issued therein on behalf of said petitioner be dismissed, and dismissing the same, hereby prays that an appeal by writ of error from said judgment be allowed to him to the said Supreme Court of the United States, in accordance with law and the rules and practices of said Supreme Court and that upon the service of citation, the said appeal may operate as supersedeas until the final disposition [fol. 228] of the case by the Supreme Court of the United States.

And in support of this petition, your petitioner herewith presents and files his assignment of errors, particularly specifying the errors relied upon by him upon his said appeal.

B. I. Salinger, Jr., Petitioner. (Signed) St. Clair Adams,
His Attorney.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

Now on this day, this cause coming on before me to be heard upon the petition of B. I. Salinger, Jr., for an order allowing him to appeal by Writ of Error to the Supreme Court of the United States for the correction of certain errors alleged by him to have occurred in the proceedings described in his petition therefor, and his petition having been duly considered, together with the Assignment of Errors filed in connection therewith.

[fol. 229] It is ordered that an appeal be allowed from the United States District Court for the Eastern District of Louisiana to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served and returned, in accordance with law.

And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States, and that to effect said supersedeas the said B. I. Salinger, Jr., shall enter into an undertaking in the sum of One Hundred Dollars, with sureties to be approved by this Court, conditioned that he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good, and shall further enter into an undertaking in the nature of a supersedeas bail bond in the penal sum of Fifteen thousand Dollars, with sureties to be approved by the Clerk of the United States District Court, conditioned for the appearance and surrender of the said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said Court and not depart the same, in the event the order being reviewed in these proceedings shall be here affirmed.

In witness whereof, I have hereunto set my hand at New Orleans La., this 27th day of April, A. D. 1923.

Signed Rufus E. Foster, Judge United States District Court
Eastern District of Louisiana.

[d. 230] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Apr. 27, 1923

Now comes the petitioner above named and in connection with his petition for appeal by Writ of Error, in the above entitled cause, and herewith his Assignment of Errors, which he says occurred in the proceedings had in the cause below and upon which he will rely to reverse, set aside and correct the judgments, orders and proceedings therein had and entered; and says that there was and is manifest error appearing upon the face of the record, and the proceedings in said cause, in this:

1. The Court erred in dismissing the petition of petitioner for habeas corpus, and remanding appellant into custody for removal—that is to say, it erred in not holding that this petitioner and appellant is wrongfully held and illegally imprisoned; and erred in dismissing his petition and remanding him into custody for removal from the Eastern District of Louisiana to the Southern Division of the District of South Dakota.

[d. 231] 2. The Court erred in not holding that this petitioner is held and imprisoned without due process of law and in violation of the Constitution of the United States and the amendments thereto.

3. The Court erred especially in ordering the removal of petitioner, and in so acting under and because of the indictment at bar, which is void and gives no one power to act thereunder, for the reason that said indictment, in violation of section 53, of the Judicial Code of the United States, was found and returned in the Western Division of the District of South Dakota, though it charges the offense to have been committed in the Southern Division of said District.

4. The indictment is void, because said Section 53 gives no authority to indict in a division in which the offense was not committed, and to transfer for trial to the division in which it is charged the offense was committed—wherefore, the Court erred, in my view in ordering the removal of the petitioner on an indictment found in a division in which no offense was committed, to the Southern Division of the District of South Dakota in which it is charged the offense was committed.

5. The Court erred in following the Biggerstaff v. U. S. (C. C. A.) 260 Fed. p. 926, which in passing upon the provision of said Section 53, that "all prosecutions shall be had in the Division in which committed," erroneously construes the said word "prosecutions" to mean "trial," when in truth said quoted word means both indictment and trial, and hence commands that the indictment must be found and returned in that Division wherein it is charged the offense was committed and said decision is in opposition

to the decision of the Supreme Court of the United States in *Post v. U. S.*, 161 U. S. 583; 16 Sup. Ct. 611; *Virginia* 148 U. S. 107; 13 Sup. Ct. 586 and *Chennault v. U. S.* 230 Fed. 942, is contrary to the weight of all authority, contrary to natural interpretation, and the rules of construction of statutes, and, as well, contrary to reason.

6. The Biggerstaff case should not have been followed for the further reason that it proceeds in contradiction of the rule that the truth of an indictment does begin a prosecution, and because said decision is based on a misapprehension of Section 53, of its legislative history, and of the general understanding as to where venue lies for prosecution for violation of Section 215.

7. The Court erred in acting under said indictment, and especially in ordering the removal of petitioner to the District of South Dakota, because though the indictment was found and returned in said District, it charged nothing but an offense committed in the Northern District of Iowa; wherefore, either indictment or trial in the District of South Dakota is without jurisdiction because of the fifth and sixth amendments to, and section three of Article three of the Constitution of the United States.

8. In so acting upon an indictment charging an offense committed in the Northern District of the State of Iowa, the Court erred because it disregarded the decision in *Stever v. U. S.* 22, U. S. 167 and in *U. S. v. Stewart (C. C. A.)* 119 Fed. 89 and *U. S. v. Conrad*, 59 Fed. 485—and disregarded the provisions of the fifth and sixth amendments to and Section three of Article three of the Constitution of the United States.

[fol. 233] 9. The Court erred in holding that the indictment competently charges a joint offense on part of petitioner and his two co-indictees, and in failing and refusing to hold that a violation of Section 215 of the Judicial Code could not be joint, and that joint violation thereof is an impossible offense.

10. The Court erred in holding that the indictment set forth anything which could affect petitioner by any of the letters counted on other than those which it is charged he himself wrote and mailed.

11. The Court erred in holding the indictment properly charged the three defendants with jointly having violated Section 215, because the indictment charges such alleged joint action by nothing but the naked conclusion that the "defendants" deposited and caused to be delivered, etc.

12. The Court erred because even if such joint indictment could by any chance be held to be the equivalent of an indictment for conspiracy to violate Section 215, then it is to be said that in the Stever case, there was an express count alleging such conspiracy, but it was held that still the venue did not lie in Kentucky, wherefore South Dakota lacks jurisdiction because even if a conspiracy indictment

ment be assumed, the only overt acts charged to be in execution of the scheme or conspiracy is mailing, etc., at Sioux City, Iowa.

13. The Court erred in holding that the letters exhibited in the indictment sustain the conclusion of the pleader that these letters were in execution or attempted execution of the scheme and artifice described in the indictment; and it erred in failing and refusing to [fol. 234] hold that said letters and each of them showed on their face that they dealt with a completed transaction, and were not in execution of or an attempt to execute the said scheme.

14. While something is said in the body of the indictment about having sold stock in South Dakota, in pursuance of authority granted, it was error to hold the indictment properly charged said sales to have been in execution or attempted execution of the alleged scheme for in that, the indictment charges said sales to be part of the scheme and not acts done in execution or attempted execution of the scheme.

15. The Court erred in acting under said indictment because it so uses conclusions as substitute for facts, is so confused, lengthy and prolix as that the accused cannot tell from it what the accusation against him is; nor what he must prepare to meet on the trial—is so framed as that it should be quashed on motion.

16. On account of the aforesaid condition of the indictment it fails to inform petitioner of the nature and cause of the accusation and the Court in acting under it deprived petitioner of the rights guaranteed to him by the eighth amendment to the Constitution of the United States.

17. The Court erred in refusing to hold that the indictment and each and every count thereof failed to state facts sufficient to charge this petitioner or any of the defendants therein named with any crime or offense against the United States or any law thereof, and that it failed to describe any crime or offense in violation of or punishable under any of the laws of the United States. [fol. 235]

18. The Court erred in refusing to hold that (subject to grounds 1 to 14 inclusive hereof) the said indictment and each and every count thereof is duplicitous and not sufficiently specific, is repugnant, too vague, indefinite, ambiguous and uncertain to charge any facts sufficient to constitute any crime or offense and to inform petitioner or the other defendants of the charge against him or them or make the same clear to the common understanding; and in refusing to hold that said indictment as a whole is needlessly long and involves and contains much redundant and immaterial allegation, which defects, when taken together, render it difficult to construe and almost unintelligible, and particularly erred in refusing to hold that it fails to show that anyone whomsoever was in effect defrauded by your petitioner or by any of the defendants named in said indictment, whether by means of the said scheme and said letters or otherwise.

By reason whereof, this petitioner and appellant prays that said order may be reversed and that he be ordered discharged.

(Signed) St. Clair Adams, Attorney for Plaintiff in Error.

[fol. 236] U. S. DISTRICT COURT, E. DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

[Title omitted]

BAIL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. Bodenheimer, agent and attorney in fact, as surety, are held and firmly bound unto the United States of America, in the full sum of Fifteen Thousand (\$15,000.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals, and dated this 27th day of April, in the year of our Lord, 1923.

Whereas, B. I. Salinger, Jr., has been granted an order of appeal herein to the Supreme Court of the United States, in the above entitled cause; and given the notice of the taking of such appeal,

Now, the condition of the above obligation is such that if the said B. I. Salinger, Jr., shall be and appear before the said Supreme Court of the United States, at and during the present term thereof, and [fol. 237] from day to day thereafter, and shall be and appear before the said Court at the next regular or special term thereof, on the first day thereof, and from day to day thereof, and term to term thereafter until finally discharged therefrom, and to abide the order and judgment of the said United States Supreme Court, and not to depart the Court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said Court may direct if the judgment of said U. S. District Court, Eastern District of Louisiana, New Orleans Division, in this cause, shall be affirmed by the Supreme Court of the United States, then the above obligation to be void, otherwise to remain in full force, virtue and effect.

(Signed) B. I. Salinger, Jr., By St. Clair Adams, Attorney.

(Signed) Southern Surety Company, By J. H. Bodenheimer, Agent and Attorney in Fact. (Seal.)

Approved: (Signed) H. J. Carter, Clerk U. S. District Court.

IN UNITED STATES DISTRICT COURT

APPEAL BOND—Filed April 27th, 1923

Know all men by these presents, that we, B. I. Salinger, Jr., as principal, and Southern Surety Company, herein represented by J. H. [fol. 238] Bodenheimer, as surety, are held and firmly bound unto The United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, in the full and just sum of One Hundred (\$100.00) Dollars to be paid to the said United States of America, and Victor Loisel, as Marshal thereof, for the Eastern District of Louisiana, certain attorney, executors, administrators or assigns to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of April, in the year of our Lord, one thousand nine hundred and twenty-three.

Whereas, lately at a session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said Court, between B. I. Salinger, Jr., plaintiff, and the United States of America, and Victor Loisel, as Marshal thereof for the Eastern District of Louisiana, defendants, a judgment was rendered against the said B. I. Salinger, Jr., and the said B. I. Salinger, Jr., having obtained an order of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, and Victor Loisel, as Marshal of the United States for the Eastern District of Louisiana, citing and admonishing them to be and appear before the United States Supreme Court to be holden at Washington, D. C., within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said B. I. Salinger, Jr., shall prosecute said appeal to effect, and answer [fol. 239] all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sgd.) B. I. Salinger, Jr. (Seal), By St. Clair Adams (Seal).
 (Sgd.) Southern Surety Co. (Seal), By J. H. Bodenheimer (Seal), Agt. and Atty. in Fact. Sealed and delivered in presence of: — — —.

Approved by (Sgd.) Rufus E. Foster, Judge.

[fol. 240] IN UNITED STATES DISTRICT COURT

WARRANT OF REMOVAL—Filed April 26, 1923

UNITED STATES OF AMERICA,
Eastern District of Louisiana:*To the President of the United States of America to the Marshal of the United States for the Eastern District of Louisiana and his Deputies or any or either of them:*

Whereas, Ben I. Salinger, Jr., has been brought before me upon a commitment made by the United States Commissioner, for the purpose of obtaining a warrant for the removal of the said Ben I. Salinger, Jr., to the District of South Dakota, in which said District the said Ben I. Salinger, Jr., is charged with a violation of Section 215 of the United States Criminal Code and in which said district the offense for which said prisoner has been committed is to be tried, a copy of which commitment is hereto annexed:

And whereas the Assistant United States Attorney for the Eastern District of Louisiana, has made application to me under the provisions of Section 1014 of the Revised Statutes of the United States for a warrant for the removal of the said prisoner to the District of South Dakota at Sioux Falls, South Dakota, and an examination of the matter having been made by me:

Now, therefore, you are hereby commanded to remove said prisoner now in your custody forthwith to the said District of South Dakota, at Sioux Falls, South Dakota, and there deliver him to the United States Marshal for the District of South Dakota, at Sioux Falls, South [fol. 241] Dakota, or some proper officer authorized to receive the said prisoner in order that he may be dealt with according to law.

Given under my hand and seal of the District Court of the United States for the Eastern District of Louisiana, at the City of New Orleans, this 26 day of April, 1923.

(Signed) Rufus E. Foster, Judge

IN UNITED STATES DISTRICT COURT

FINAL MITTIMUS

UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:*The President of the United States of America to the Marshal of the Eastern District of Louisiana and to the Keeper of the House of Detention, in the City of New Orleans, Greeting:*

Whereas, Ben J. Salinger, Jr., has been arrested upon the oath of L. P. Bryant, Jr., for having, on or about the 20 day of May, 1923,

in said District, in violation of Sec. 215 C. C. of the United States, unlawfully use- the mail with a scheme to defraud.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Ben J. Salinger, Jr., committed said offense as charged, I have directed that said Ben J. Salinger, Jr., be held to bail in the sum of \$15,000, to appear before the District Court of the United States for the Eastern District of Louisiana, on the 20 [fol. 242] day of April, 1923, and from time to time thereafter, to which the case may be continued and he having failed to give the required bail:

Now, these are therefore, in the name and by the authority aforesaid, do command you, the said Marshal, to commit the said Ben J. Salinger, Jr., to the custody of the Keeper of said Jail of the City of New Orleans, and to leave with said Jailer a certified copy of this writ; and to command you the Keeper of said Jail of said City, to receive the said Ben J. Salinger, Jr., prisoner of the United States of America, into your custody, in said Jail, and him there safely to keep until he be discharged by due course of law.

In witness whereof, I have hereto set my hand and seal at my office in said District, this 18 day of April, A. D. 1923.

(Signed) A. H. Browne, United States Commissioner for said Eastern District of Louisiana. (Seal.)

[fol. 243]

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

Extract from the Judgment Book

New Orleans, Saturday, April 28th, 1923.

This cause came on this day to be heard upon the application of the relator for a writ of habeas corpus;

Present: St. Clair Adams, Attorney for relator, and the relator, B. I. Salinger, Jr., in person; L. P. Bryant, Jr., Assistant United States Attorney, for Victor Loisel, U. S. Marshal, respondent;

Whereupon, after hearing the pleadings, evidence, testimony, and arguments of counsel and on due consideration thereof;

It is ordered, adjudged and decreed that the alternative writ of habeas corpus heretofore issued in this cause be recalled, that the application of the relator for a writ of habeas corpus be and the same is hereby denied, that the petition of the relator be dismissed with costs, and that the said relator, Ben I. Salinger, Jr., be remanded

[fol. 244] to the custody of Victor Loisel, United States Marshal, for this District, respondent herein.

Judgment rendered April 28th, 1923.

Judgment signed April 28th, 1923.

(Signed) Rufus E. Foster, Judge.

UNITED STATES DISTRICT CT., EASTERN DISTRICT OF LOUISIANA

[Title omitted]

PRÆCIPICE FOR TRANSCRIPT OF RECORD—Filed May 3, 1923

To the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division:

SIR: You will please incorporate in the transcript of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled and numbered cause, the following:

1. Petition for writ of Habeas Corpus.

2. The return of the United States Marshal to said petition.

[fol. 245] 3. Certified copy of the indictment.

4. Certified copy of the motion or application for order of transfer of said indictment from the Southern Division of the District of South Dakota, to the Western Division of said District.

5. All of the documents, testimony and proceedings in the matter of B. I. Salinger, Jr., versus Victor Loisel, United States Marshal, No. 17233 of the docket of this Court, except the indictment, motion to transfer from the Southern Division to the Western Division of the District of South Dakota, return of the Government to the petition for writ of Habeas Corpus.

6. All of the documents, testimony and proceedings in the matter of B. I. Salinger, Jr., versus Victor Loisel, United States Marshal, No. 17238 of the docket of this Court, except the indictment, motion to transfer from the Southern Division to the Western Division of the District of South Dakota, return of the Government to the petition for writ of habeas corpus.

7. The warrant of removal.

8. Judgment.

Yours truly, (Signed) St. Clair Adams, Attorney for Appellant.

[fol. 246] IN UNITED STATES DISTRICT COURT

LETTER OF ASST. U. S. ATTY. TO HAVE CERTAIN EXHIBITS INCLUDED
IN TRANSCRIPT—Filed May 18, 1923

On Letter Head of United States Attorney, Eastern District of Louisiana

New Orleans, La., May 18th, 1923.

Mr. H. J. Carter, Clerk U. S. District Court, New Orleans, La., Eastern District of La.

No. 17,243, United States ex rel. B. I. Salinger, Jr., vs. Victor Loisel

DEAR SIR: It will be noted from the appellant's preceipe in the above entitled matter that the same calls for the inclusion of all of the documents, testimony and proceedings in the cases No. 17,233 and No. 17,238 of the Docket of the District Court.

Having examined the record, as heretofore made up and forwarded to the office of the Clerk of the United States Circuit Court of Appeals, I note that the following items contained in record No. 17,233 have been omitted:

1. Transcript of Record, United States Circuit Court of Appeals for the Second Circuit.

2. The bond given before the Clerk of the District Court of the United States for the Southern District of New York.

[fol. 247] 3. Certified copy of Order of United States District Court for the Southern District of New York.

4. Minutes of proceedings had in United States Court for the District of South Dakota on April 23rd, 1923.

In record No. 17,238, the item consisting of Bench Warrant issued under seal of the United States District Court for the District of South Dakota.

We should thank you to include the said items above mentioned in the transcript of record No. 17,243.

Respectfully, For the U. S. Atty. (Signed) L. P. Bryant, Jr.,
Asst. U. S. Atty.

CLERK'S OFFICE

CLERK'S CERTIFICATE

I, Henry J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, do hereby certify the following documents to be true and correct copies of the originals of record in this office:

Petition for Writ of Habeas Corpus and order.
 Answer and Return to petition for writ of Habeas Corpus.
 Exhibit—Indictment.
 Motion for Transfer to District of South Dakota.

[fol. 248] Documents in Case No. 17,233:

Petition for writ of Habeas Corpus.
 Report of Hearing April 20, 1923.
 Exhibit—Transcript of Record, U. S. Circuit Court, 2nd Circuit.
 Exhibit—Bond on Removal to the District of South Dakota.
 Exhibit—Copy of Order on Mandate of U. S. Circuit Court of Appeals, 2nd Circuit.
 Exhibit—Minute Entries of U. S. Dist. Court, District of South Dakota.
 Warrant of Removal.
 Judgment.
 Petition for Appeal and Order.
 Assignment of Errors.
 Bail Bond.
 Appeal Bond.

Documents in Case No. 17,238:

Petition for Writ of Habeas Corpus & Order.
 Report of Hearing April 20th, 1923.
 Exhibit—Bench Warrant.
 Warrant of Removal.
 Return of U. S. Commissioner.
 Judgment.
 Petition for Appeal and order.
 Assignment of Errors.
 Bail Bond.
 Appeal Bond.
 Warrant of Removal.
 Judgment.

Præcipe for Appellant.
 [fol. 249] Letter of Asst. U. S. Atty. to have certain exhibits included in Transcript.
 Clerk's Certificate.
 Witness my hand and the seal of said Court at the City of New Orleans, La., this 21st day of May, A. D. 1923.

H. J. Carter, Clerk. (Seal)

[fol. 250] That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

[Title omitted]

ARGUMENT AND SUBMISSION

Extract from the Minutes of December 3rd, 1923

On this day this cause was called, and, after argument by B. I. Salinger, Esq., for appellant, and Louis H. Burns, Esq., U. S. Attorney, for appellees, was submitted to the Court.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER COMMITTING APPELLANT TO THE PARISH PRISON PENDING DETERMINATION OF CASE

Extract from the Minutes of December 3rd, 1923

It is ordered that a commitment issue herein committing B. I. Salinger, Jr., appellant herein, to the Parish Prison of the Parish of Orleans, State of Louisiana, at New Orleans, La., pending the determination of the above entitled and numbered cause.

[fol. 251] **UNITED STATES OF AMERICA:**

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

COMMITMENT—Issued December 3rd, 1923

To the Marshal of the Eastern District of Louisiana or either of his Deputies and the Keeper of either of the Gaols in said District, Greeting:

These are, in the name of the President of the United States of America, to command you, the said Marshal or Deputies, and each of you, forthwith to convey and deliver into the custody of the Keeper of the Parish Prison of the Parish of Orleans, State of Louisiana, the body of B. I. Salinger, Jr., as directed by the order this day entered in the proceedings entitled "B. I. Salinger, Jr., Appellant, versus The United States of America, and Victor Loisel, as U. S. Marshal, Eastern District of Louisiana, Appellees."

And you the said Keeper, in the name of the President of the United States of America, aforesaid, are hereby commanded to receive the said B. I. Salinger, Jr., into your custody in said Parish Prison, and him there safely to keep or be otherwise discharged in due course of law, until the further orders of the Court.

Hereof fail not at your peril.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 3rd day of December, in the year of our Lord one thousand nine hundred and twenty-three.

(Signed) Frank H. Mortimer, Clerk of the U. S. Circuit Court of Appeals, for the Fifth Circuit. (Seal.)

[fol. 252] MARSHAL'S RETURN—Filed December 5th, 1923

Received by U. S. Marshal, New Orleans, La., Dec. 3/23, and on the same day month and year I executed this writ by delivering the body and person of the within named B. I. Salinger, Jr., into the custody and keeping of the Warden of the Parish Prison in New Orleans, La., and within the four walls of said prison, as aforesaid by law.

Victor Loisel, U. S. Marshal, By (Signed) E. M. Kinler, Dy.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

MOTION OF APPELLANT TO BE RELIEVED FROM CUSTODY—Filed December 4th, 1923

Comes now the said appellant and petitions the court that he be on conditions relieved from being in custody pending final decision of his appeal in this Court, to which he was committed by said order of said date. In support he attaches as part of this application, his own affidavit.

B. I. Salinger, Jr., By (Signed) St. Clair Adams & B. I. Salinger.

CERTIFICATE

The undersigned, counsel for Petitioner, hereby certify that this application is made in good faith.

(Signed) St. Clair Adams, B. I. Salinger.

[fol. 253] STATE OF LOUISIANA,
Parish of Orleans:

AFFIDAVIT OF B. I. SALINGER, JR.

I, B. I. Salinger, Jr., being first duly sworn say on my oath: His Honor, the Senior Judge of this Court made order that pending this appeal this affiant be enlarged on giving bail bond in \$5,000.00 conditioned that he would conform to and abide by the

orders of this Court; he gave such bond, and same, a surety company bond, subsisted and was in force when this Court made said order. While said bond was in force, affiant was in Chicago, Illinois, with the consent of the Court from which said appeal was taken. While in Chicago a complaint was lodged against him there, seeking his removal to the District of South Dakota on the same indictment involved in this appeal. The complaint made no mention of this appeal or those to the Supreme Court of the United States; nor said bond in this Court or in the Supreme Court.

The District Judge of whom removal was sought, compelled affiant to give bond in \$10,000, obliging affiant to abide the orders of said Judge; and he has postponed action from time to time awaiting whether the Government would move to dismiss affiant's appeals to the Supreme Court. The last postponement was made November 28th, 1923, and to December 10th, 1923. It was made though affiant protested that it was his duty to appeal in this Court on December 3d, 1923. He finally made application to be permitted to be before this Court on December 3d, 1923. The application was denied, and the Judge said it was absurd to claim that affiant was bound to then appear in the Court in person. Notwithstanding this, affiant did come and appear in person in this Court on December 3d, 1923. The order now sought to be modified was made, notwithstanding, [fol. 254] standing, and thereunder he is now in prison to be there kept if said order remains unchanged until such time as his appeal may be decided.

He respectfully shows that he took this appeal in good faith—one object being that if relief was denied him in the District Court of Louisiana, to have the Supreme Court pass upon whether he ought to be removed; and that he sought no writ for the purpose of delay. He pledges himself under this oath to make no further application for a writ of habeas corpus in any place, neither by himself or by agent or through other counsel. He hereby consents that in addition to any other remedy or punishment that the Government or this Court may impose on violation of this pledge, that the application for such a writ, no matter where made, shall automatically operate as a forfeiture of the bonds given in this Court, and aggregating \$10,000.00; and shall ipso facto work a dismissal of his appeal in this court.

Whereupon he prays that upon said conditions he be relieved from the imprisonment he is suffering by reason of said order of December 3d, 1923.

(Signed) B. I. Salinger, Jr.

Sworn and subscribed to before me this 4th day of December, A. D. 1923. (Signed) Francis P. Burns, Notary Public.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER DENYING MOTION OF APPELLANT

Extract from the Minutes of December 4th, 1923

On consideration of the motion of the appellant that he be relieved from being in custody on conditions, pending the final decision of [fol. 255] his appeal in this Court herein;

It is ordered that said motion be, and the same is hereby denied.

[fol. 256] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

[Title omitted]

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION OF THE COURT—Filed December 11th, 1923

BRYAN, Circuit Judge: This is an appeal from an order of the district court for the Eastern District of Louisiana, dismissing a petition for a writ of habeas corpus and remanding the petitioner, B. L. Salinger, Jr., for removal for trial to the District of South Dakota.

May 20, 1922, the petitioner was indicted in the western division [fol. 257] of the District of South Dakota. The indictment is drawn under section 215 of the Criminal Code, and charges the petitioner and others, with devising a scheme to defraud, and, for the purpose of executing such scheme, with placing certain letters in the United States mail at Sioux City, Iowa, and causing the same to be delivered within the southern division of the District of South Dakota.

June 13, 1922, the petitioner gave bond in Iowa for his appearance for trial, but did not appear. A bench warrant was thereupon issued against him, and he was arrested in New York, where he brought habeas corpus proceedings in the Federal district court. The District Judge dismissed the petition and ordered the petitioner removed to South Dakota for trial. This order was affirmed on appeal to the Circuit Court of Appeals for the Second Circuit. *Ex parte Salinger*, 288 Fed. 752; and thereupon, on March 20, 1923, the petitioner again gave bond for his appearance on April 3, 1923, for trial in South Dakota.

March 31, 1923, the petitioner was surrendered by the surety on his bond last mentioned to the marshal in New Orleans, and immediately filed his petition for a writ of habeas corpus before the

District Judge for the Eastern District of Louisiana and secured his release from custody by giving bond for his appearance at the final hearing on the petition. April 18, a second petition was filed, which included a prayer for a writ of certiorari. April 26, upon final hearing, the said District Judge dismissed these two petitions and signed two warrants of removal, but April 27, he approved supersedeas bonds and allowed appeals to the Supreme Court.

In the meantime, the District Judge for the District of South Dakota had forfeited petitioner's bond of March 20, 1923, given in New [fol. 258] York, and issued another bench warrant; and removal proceedings under R. S. section 1014 had been taken and completed before a commissioner in New Orleans. Based on these later proceedings, the court below, on April 26, signed a third warrant of removal, and refused to sign an order allowing an appeal. April 27, petitioner applied for a third writ of habeas corpus, but the next day the Court entered an order dismissing his petition; and this last order is brought here for review. The appeal, to operate as a supersedeas upon bond being given, was allowed by a member of this court. The bond was given, and the petitioner has not been removed.

The surety who furnished bond in New York and surrendered the petitioner to the marshal in New Orleans is also the surety on the appeal bonds in the Supreme Court and in this Court.

It is suggested that the District Court erred in issuing its third warrant of removal on the ground that the Supreme Court will be deprived of its jurisdiction on the appeals taken to it, in the event the petitioner is removed before those appeals are reached for decision. Three warrants for removal were granted the day before the appeals to the Supreme Court were allowed. Only two of these warrants were affected by those appeals. The third warrant remained unaffected, and there was nothing to prevent petitioner's removal except the subsequent allowance of an appeal by a member of this Court. Our concern is therefore solely with the case on appeal here, in which the warrant of removal is based on a bench warrant due to the forfeiture of the bond given by the petitioner in the Southern District of New York for his appearance in the District of South Dakota.

The petitioner seeks to prevent his removal for trial on the ground that the District Court in South Dakota is without jurisdiction, be- [fol. 259] cause (a) the indictment was found in one division for an offense alleged to have been committed in another, and (b) the indictment does not charge that the letters were mailed within the jurisdiction of the trial court. These same contentions were made in New York, in both the District Court and in the Circuit Court of Appeals. It appears that the Circuit Court of Appeals for the Eighth Circuit, in which South Dakota is, has ruled against the first contention in *Biggerstaff v. United States*, 260 Fed. 926, and against the second in *Moffatt v. United States*, 232 Fed. 522. The Circuit Court of Appeals for the second Circuit in *Ex parte Salinger*, supra, indicated that it agreed with these rulings.

We do not think it would be seemly or proper for this Court also pass upon these same contentions. In its final analysis, this is but an attempt to substitute a writ of habeas corpus for a writ of error.

It is also, as it seems to us, a palpable abuse of the writ of habeas corpus. When the first bond was given in Iowa, which is in the Eighth Circuit, the petitioner made bond to appear for trial; and in New York, after he had unsuccessfully attempted to prevent his removal, he voluntarily gave bond for his appearance for trial, and instead of complying with his bond, he again thwarted a trial by applying for further writs of habeas corpus outside of the jurisdiction of the trial court. The fact that the same surety which surrendered the petitioner in Louisiana, instead of delivering him up for trial in South Dakota, again bound itself by new bonds is sufficient of itself to show that the resort to the court below was not really for the purpose of enabling the petitioner to secure his liberty, but was designed to obtain, if possible, a ruling upon the validity of the indictment by the court below different from the rulings made in the Second Circuit, where the former application for habeas corpus was made, and [fol. 260] in the Eighth Circuit, in which the trial is sought to be held. The case presented to us is therefore similar to the case of Stallings v. Spalin, 253 U. S. 339. See also *In re Chapman*, 156 U. S. 211; *Riggins v. United States*, 199 U. S. 547; *Johnson v. Hoy*, 227 U. S. 245, and in *Ex parte Ford*, reported in 35 L. R. A., (N. S.) 882.

The conclusion is that the order dismissing the writ of habeas corpus, and remanding the petitioner for removal to the District of South Dakota should be, and it is

Affirmed.

(Original filed December 11th, 1923.)

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

JUDGMENT

Extract from the Minutes of December 11th, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed.

[fol. 261] UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

CLERK'S CERTIFICATE

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 250 to 260 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4088, wherein B. I. Salinger, Jr., is appellant, and The United States of America, and Victor Loisel, as U. S. Marshal, Eastern District of Louisiana, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 249 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 13th day of December, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

[fol. 262] WRIT OF CERTIORARI AND RETURN

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which B. I. Salinger, Jr., is appellant, and The United States of America and Victor Loisel, as United States Marshal, Eastern District of Louisiana, are appellees, No. 4088, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme [fol. 263] Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 264] [File endorsement omitted.]

—
[fol. 265] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 4088

B. I. SALINGER, JR., Appellant,

versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL as U. S. MARSHAL EASTERN DISTRICT OF LOUISIANA, Appellees

Clerk's Office

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit do hereby certify that the attached transcript, of 261 pages, contains full, true and complete copies of the pleadings, proceedings and record entries, including the opinion of said United States Circuit Court of Appeals, in a certain cause wherein B. I. Salinger, Jr., was appellant, and The United States of America, and Victor Loisel, as United States Marshal for the Eastern District of Louisiana, were appellees, No. 4088, of the dockets of said Circuit Court of Appeals, as full, true and complete as the same remain on file and of record in my office.

In pursuance of the command of the foregoing Writ of Certiorari, said transcript is transmitted to the Supreme Court of the United States.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Fifth Circuit, at the city of New Orleans, State of Louisiana, this 13th day of December, A. D. 1923.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth District.)

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1923

No. 705

[Title omitted]

STIPULATION FOR OMISSION OF INDICTMENT

It is hereby stipulated that in printing the transcript of record herein the indictment need not be printed it being the same indictment as is printed in the records in Nos. 341 and 342.

James M. Beck, Solicitor General. B. I. Salinger, Counsel for Petitioner.

76W My 36

Carroll, Iowa, 109 p. Dec. 28, 1923.

Clerk of the U. S. Supreme Court, Washn. D. C.:

Have today mailed you check for Four Hundred Dollars as per yours of the Twenty Seventh stop obtain direction from Beck that indictment is to be omitted and you may sign my name to that direction.

B. I. Salinger.
254 p.

Endorsed on cover: File No. 30,015. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 705. B. I. Salinger, Jr., petitioner, vs. The United States of America and Victor Loisel, as United States Marshal, Eastern District of Louisiana. (Writ of certiorari and return.) Filed December 19th, 1923. File No. 30,015.

(1522)